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Supreme Court, U.S.
FILED

No. 98-1491 MAR 17 1999

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GLOBE INTERNATIONAL, INC.,
Petitioner,

v.

KHALID KHAWAR,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a media defendant makes an accurate report of allegations in a book by a best-selling author about a matter of utmost public concern, may a finding of actual malice be based on a court's own view that the book's allegations were "highly improbable" and therefore should have been investigated by the media defendant before reporting the book's allegations?

2. Where an individual is drawn into a public controversy, should that individual be deemed a public figure for the limited purpose of media reports about that controversy, regardless of whether the individual voluntarily invited comment and criticism by injecting himself into the controversy?

3. Are neutral and accurate reports of previously published matters of public concern entitled to an absolute privilege?*

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* The parties to the proceedings in the Supreme Court of the State of California are named in the title of this petition. Petitioner Globe International, Inc., has no parent or subsidiary companies, other than wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion and judgment of the Supreme Court of California is reported at 19 Cal. 4th 254 and, as modified on December 22, 1998, is printed in Appendix A. The order on denial of rehearing is printed in Appendix B.

JURISDICTION

The opinion and judgment of the Supreme Court of the State of California was initially filed and entered on November 2, 1998 and amended on December 22, 1998 (Appx. A), and its order denying rehearing was filed and entered on December 22, 1998 (Appx. B). This Court has jurisdiction pursuant to section 1257(a) of Title 28 of the United States Code.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Background. In November 1988, a book entitled *The Senator Must Die: The Murder of Robert F. Kennedy* was published by Roundtable Publishing, Inc. Appx. A, p. 2a. The book was authored by Robert Morrow, an established authority on assassination conspiracy; Morrow also wrote *Betrayal,* a *New York Times* best-seller about the assassination of President John F. Kennedy. *See* Reporter's Transcript on Appeal ("RT"), pp. 2047-2048; Appendix in Lieu of Clerk's Transcript on Appeal ("Appx. on Appeal"), pp. 1751-1880; Trial Exhibits ("Ex."), Ex. 251. Roundtable published 25,000 hardcover copies of Morrow's new conspiracy book in its first printing. *See* Appx. A, p. 12a.

The theory set forth in *The Senator Must Die* is that Robert Kennedy was assassinated by the Iranian Secret Police working in conjunction with organized crime. RT 1145; Ex. 576, pp. 2-3. The book alleged that Sirhan Sirhan did not fire the fatal shots, but was involved in the plot as a decoy. *Id.* According to Morrow, the true assassin was a man identified as "Ali Ahmand." Ex. 576, pp. 184-185. The book contained four photographs that appeared beneath the caption, "Photographs of Ali Ahmand." Ex. 576, pp. 272-273. These photographs depict respondent Khalid Iqbal Khawar ("Khawar") standing

on the podium near Senator Kennedy on the night of the assassination. *Id.*

The April 4, 1989 edition of *Globe,* a weekly newspaper published by petitioner Globe International, Inc. ("Globe"), contained an article on Morrow's book entitled, "Former CIA Agent Claims: Iranians Killed Bobby Kennedy for the Mafia." Ex. 503. The *Globe* article was accompanied by one of the photographs that had previously been published in the book, and the article noted that Morrow claimed that the real assassin was a man who called himself "Ali Ahmand." Ex. 503; Ex. 576, p. 272.

On August 31, 1989, Khawar filed suit in the Superior Court of the State of California, County of Los Angeles, alleging that the *Globe* article defamed him. Appx. on Appeal 1-41. The jury found that the *Globe* article was a neutral and accurate report of the Morrow book, but nonetheless awarded Khawar $1,175,000 in damages, including $500,000 in punitive damages. Appx. A, p. 5a. The Court of Appeal of the State of California affirmed, but thereafter the Supreme Court of the State of California granted Globe's petition for review. Appx. A, p. 6a.

The California Supreme Court opinion. The California Supreme Court affirmed the Court of Appeal on November 2, 1998. Appx. A. The California Supreme Court held that Globe acted with actual malice in republishing the Morrow book's accusation. Appx. A, p. 33a. The California Supreme Court cited *Harte-Hanks Communications v. Connaughton,* 491 U.S. 657 (1989), in stating that there is actual malice "'"where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports"' . . ., and the republisher failed to interview obvious witnesses who could have confirmed or disproved the allegations . . . or to consult

relevant documentary sources . . . ." Appx. A, pp. 27a-28a. The California Supreme Court then reasoned:

> There were, to say the least, obvious reasons to doubt the accuracy of the Morrow book's accusation that Khawar killed Kennedy . . . . In asserting that Khawar, and not Sirhan, had killed Kennedy, the Morrow book was making the highly improbable claim that results of the official investigation, Sirhan's trial, and this court's decision on Sirhan's appeal, were all fundamentally mistaken.
>
> Because there were obvious reasons to doubt the accuracy of the Morrow book's central claim, and because the claim was an inherently defamatory accusation against Khawar, the jury could properly conclude that Globe acted with actual malice in republishing that claim if it found also, as it impliedly did, that Globe failed to use readily available means to verify the accuracy of the claim by interviewing obvious witnesses who could have confirmed or disproved the allegations or by inspecting relevant documents or other evidence. (*Harte-Hanks Communications v. Connaughton, supra,* 491 U.S. 657, 682-684).

Appx. A, pp. 28a-29a.

The California Supreme Court also held that Khawar is a private figure because he had not "acquired sufficient media access in relation to the controversy surrounding the Kennedy assassination or the Morrow book to effectively counter the defamatory falsehoods in the Globe article." Appx. A, p. 11a. Finally, the California Supreme Court held that there is no neutral reportage privilege extending to reports regarding private figures. Appx. A, p. 24a.

On December 22, 1998, the California Supreme Court denied a petition for rehearing. Appx. B.

REASONS FOR GRANTING CERTIORARI

The California Supreme Court's opinion seriously threatens the right of the media to accurately report previously published allegations of public concern. The opinion imposes a duty to independently investigate before reporting a book's allegations; otherwise a media defendant faces the risk that a court may someday view the book's allegations as "highly improbable." At the very least, the opinion encourages plaintiffs to sue anyway, in the hope that a court can be persuaded that the book's allegations are "highly improbable."

The danger of this precedent is underscored in this case, where there was an accurate report of a best-selling author's allegations, and the subject matter was of utmost public concern. Petitioner Globe accurately reported a best-selling author's allegations that Robert Kennedy had been assassinated by the Iranian Secret Police, not Sirhan Sirhan. Yet, the California Supreme Court found actual malice based on its own assumption that the conviction of Sirhan Sirhan for the murder of Robert Kennedy was infallible and beyond public discussion, even though there is on-going controversy regarding Robert Kennedy's death.

This case also presents two additional issues of crucial importance to the First Amendment: (1) whether an individual drawn into a public controversy should be deemed a public figure for the limited purpose of media reports about that controversy—that is, an "involuntary public figure"—and, (2) whether neutral and accurate reports of previously published matters of public concern should be entitled to an absolute privilege, commonly known as a "neutral reportage" privilege. Both of these issues are squarely presented in this case, and offer this Court an opportunity to provide lower courts with much-needed

guidance as to the scope of First Amendment protection in these areas.

I. THE CALIFORNIA SUPREME COURT'S OPINION SERIOUSLY THREATENS THE RIGHT OF THE MEDIA TO ACCURATELY REPORT PREVIOUSLY PUBLISHED ALLEGATIONS OF PUBLIC CONCERN.

The newspaper article at issue in this case accurately reported allegations in a book by a best-selling author about a matter of utmost public concern—the assassination of Robert Kennedy. Nevertheless, the California Supreme Court upheld a finding of "actual malice," based on that court's own view that the book's allegations were "highly improbable" and therefore should have been investigated by the newspaper before reporting the book's allegations. The California Supreme Court's opinion seriously threatens the right of the media to accurately report previously published allegations of public concern.

In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), this Court outlined the parameters of the constitutional threshold of "actual malice"—that is, that a "false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth" (491 U.S. at 688):

> A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of . . . probable falsity." As a result, failure to investigate before publishing, even when a reasonably

> prudent person would have done so, is not sufficient to establish reckless disregard. *In a case such as this involving the reporting of a third party's allegations, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."*

491 U.S. at 688 (emphasis added; citations omitted).

The critical issue is whether a court may find "obvious reasons to doubt" a book's previously published allegations, and therefore impose a duty on a newspaper to investigate the book's allegations prior to reporting them, based solely on the court's own view that the book's allegations are "highly improbable." Here, the California Supreme Court finds that Globe should have investigated the Morrow book's allegations, because:

> There were, to say the least, obvious reasons to doubt the accuracy of the Morrow book's accusation that Khawar killed Kennedy . . . . In asserting that Khawar, and not Sirhan, had killed Kennedy, the Morrow book was making the highly improbable claim that results of the official investigation, Sirhan's trial, and this court's decision on Sirhan's appeal, were all fundamentally mistaken.

Appx. A, p. 28a.

In effect, the California Supreme Court has held that a reasonable person would have concluded that the allegations in the Morrow book were implausible. Such a "reasonable person" concept has no place in an "actual malice" analysis: "[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks*, 491 U.S. at 688. There are good reasons for this rule. Many important news stories that ultimately have been proven correct have initially been denounced as implausible or false. If the initial allegations are from a

responsible source and concern a matter of vital public interest, courts should not second-guess "plausibility."

Here, for example, there is undisputed evidence that prominent and credible individuals do not accept the "official" version of Robert Kennedy's death. Notably, in a 1983 book, Dr. Thomas Noguchi, the former Chief Medical Examiner of Los Angeles County who performed the Robert Kennedy autopsy, raised serious questions with respect to the assassination:

> Back at the Hotel Ambassador, another witness told police that he too had seen the girl in the white polka-dot dress run out of the hotel. But he added a troubling detail. A "dark complected" man had been running with her.
>
> Only one dark-complected man, Sirhan Sirhan, was in custody. Had an accomplice escaped?
>
> . . . .
>
> [S]cientific evidence . . ., and a host of witnesses who did not actually see Sirhan fire the fatal shot, all seemed to indicate there may have been a second gunman . . . .
>
> . . . .
>
> [T]he existence of a second gunman remains a possibility. Thus I have never said that Sirhan Sirhan killed Robert Kennedy.

Ex. 533, pp. 94, 107, 108. Questions about Robert Kennedy's death continue to be raised in public symposia throughout the country and in publications.[1] *See* Exs.

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[1] Indeed, Khawar referred below to a 1995 book by Dan E. Moldea noting that although Moldea concluded in 1994 that Sirhan was the sole assassin, Moldea's earlier investigations (in 1987) had led him to believe that

> [b]ecause of overwhelming quasi-official corroboration that two guns had been fired, this new evidence of a second gunman

519, 544; RT 2047, 2183-2187. The California Supreme Court erred, as a matter of law, in finding actual malice based on the court's own view that the Morrow book's allegations were "highly improbable." [2]

The California Supreme Court has created a dangerous precedent by imposing the risk upon a media defendant that a court may later view allegations as "highly improbable," even if those allegations are made by a best-selling author, are previously published, and are about a matter of utmost public concern. The ruling below allows the lower courts to find actual malice merely by characterizing allegations as "highly improbable"; it will necessarily "chill" the media from re-reporting allegations made in other publications. Media entities will be reluctant to take on the risk that a court may one day view even a previously published allegation as "highly improbable."

> nearly constituted conclusive proof . . . [A] second gun appeared to have been fired.

The Killing of Robert F. Kennedy, by Dan E. Moldea, p. 306.

[2] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), is instructive. In *Gertz*, the John Birch Society had accused Gertz of being part of a nationwide Communist conspiracy to discredit local police in order to make way for a national police force supporting a Communist dictatorship. 418 U.S. at 325-26. Most Americans and most courts no doubt would have deemed the existence of such a conspiracy to be "highly improbable." Yet, in its statement of the case, this Court discusssed with approval the lower court's ruling that there was no evidence of actual malice:

> There was no evidence that the managing director of [the John Birch Society magazine] knew of the falsity of the accusations made in the article. In fact, he knew nothing about [Gertz] except what he learned from the article. The [Court of Appeals] correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a "high degree of awareness of . . . probable falsity." The evidence in this case did not reveal that respondent had cause for such an awareness.

418 U.S. at 332 (citations omitted).

The change in the law effected by the California Supreme Court could literally change history. For example, when the *Washington Post* initially reported the Watergate allegations detailing the President's involvement with petty criminals, those allegations may have seemed "highly improbable" to many. Yet, those allegations were re-reported by virtually every news organization in the country. Under the California Supreme Court's rule, each of those news organizations would now face the risk of being found to have acted with "actual malice" for failing to investigate the *Washington Post's* allegations themselves before reporting on those allegations. That should not be the law.

Moreover, under the ruling below, once a person is convicted of murder (or any other crime), the right of the media to report on previously published doubts about that conviction virtually disappear. But convictions, even after appellate review, are not infallible. At the very least, the media should be free to report on a commentator's doubts about a conviction—such open, public discussion is an important part of our heritage. For example, in 1927, five years after the convictions of Sacco and Vanzetti, Felix Frankfurter wrote an extensive article in *The Atlantic Monthly* criticizing the trial and the convictions.[3] As might be expected, Frankfurter's criticism of the convictions attracted much attention at the time. Yet, under the erroneous reasoning of the ruling below, news organizations could not have reported on Frankfurter's allegations without first investigating those allegations themselves! Clearly, the ruling below, if left unreviewed, will also have a devastating impact upon public

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[3] Felix Frankfurter, "Case of Sacco and Vanzetti," *Atlantic Monthly* 139 (March 1927), 409-32; *see* Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Alfred A. Knopf 1994), 388-396.

discussion of criminal justice, even where (as here) there are continuing doubts and public concern.

II. AN INDIVIDUAL DRAWN INTO A PUBLIC CONTROVERSY SHOULD BE DEEMED A PUBLIC FIGURE FOR THE LIMITED PURPOSE OF MEDIA REPORTS ABOUT THAT CONTROVERSY.

This case also squarely presents the issue of whether an individual drawn into a public controversy should be deemed a public figure for the limited purpose of media reports about that controversy—that is, an "involuntary public figure."

This Court's opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), contains language suggesting the possibility of an "involuntary public figure":

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself *or is drawn into a particular public controversy* and thereby becomes a public figure for a limited range of issues.

418 U.S. at 351 (emphasis added). Indeed, the California Supreme Court's opinion below recognizes that *Gertz* "has indicated that purposeful activity may not be essential for public figure characterization." Appx. A, p. 11a. However, the California Supreme Court goes on to hold:

> [A]ssuming a person may ever be accurately characterized as an *involuntary* public figure, we infer from the logic of *Gertz* that the high court would reserve this characterization for an individual who, despite never having voluntarily engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as

> to permit media access sufficient to effectively counter media-published defamatory statements.
>
> We find in the record no substantial evidence that Khawar acquired sufficient media access in relation to the controversy surrounding the Kennedy assassination or the Morrow book to effectively counter the defamatory falsehoods in the Globe article.

Appx. A, p. 11a.

The California Supreme Court misconstrued *Gertz*. Once an individual is drawn into a paramount public controversy, the individual should be deemed a public figure for limited purposes because such individuals "*usually* enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344 (emphasis added). But there should be no requirement that a media defendant prove that the individual plaintiff had "substantial media access." Where an individual is drawn into an important public controversy, the individual should be deemed a public figure for the limited purpose of media reports about that controversy, regardless whether the individual has "substantial media access." [4]

Here, the publication of Morrow's book was itself an event of interest to the public. One court has observed, "the public interest in the assassination of Senator Kennedy and the ensuing investigation is great indeed." *Stone*

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[4] Indeed, *Gertz* itself makes a similar, related point:

> *Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption* that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.

Gertz, 418 U.S. at 345 (emphasis added).

v. F.B.I., 727 F. Supp. 662 (D.D.C. 1990). Shortly after publication of Morrow's book, Pulitzer prize-winning author C. David Heyman wrote in his book, *A Woman Named Jackie:*

> As with the assassination of JFK, myriad theories surrounded the death of his younger brother. The most convincing theory regarding the RFK assassination was recently suggested by former CIA contract man Robert Morrow in *The Senator Must Die* . . . .

Ex. 515, p. 484; RT 1605, 2521. Thus, Khawar was thrust, albeit against his will, toward the center of a continuing controversy about Robert Kennedy's assassination. Such circumstances are described in the Restatement of Torts (Second):

> There are . . . individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become "news."

Restatement (2d) Torts (1977) section 652D, comment f; *see Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 741 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986) ("Persons can become involved in public controversies and affairs without their consent or will").

This Court should resolve the issue of whether a person drawn into a public controversy may become an "involuntary public figure" and, if so, what the parameters of such an "involuntary public figure" might be. If this issue is left unresolved, the media will be chilled in reporting on legitimate subjects of public controversy.

III. NEUTRAL AND ACCURATE REPORTS OF PREVIOUSLY PUBLISHED MATTERS OF PUBLIC CONCERN SHOULD BE ENTITLED TO AN ABSOLUTE PRIVILEGE.

Finally, this case also presents the issue of whether neutral and accurate reports of previously published matters of public concern should be entitled to an absolute privilege, commonly known as a "neutral reportage" privilege.

This privilege, derived from the First Amendment, was first recognized by the Second Circuit in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. (1977), *cert. denied*, 434 U.S. 1002 (1977). In *Edwards, The New York Times* reported statements made by the National Audubon Society questioning the good faith of scientists who supported continued use of DDT. In reversing a libel judgment against *The New York Times*, the Second Circuit observed:

> What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. The public interest in being fully informed about controversies that often rage about sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

556 F.2d at 120 (citation omitted). Accordingly, a court applying a "neutral reportage" privilege focuses on the publisher's view of the accuracy of its report of the charges made by another, not the accuracy of the underlying charges themselves.

> [I]f we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made.

Edwards, 556 F.2d at 120.

The California Supreme Court correctly recognized in the opinion below that there is a split in the courts on the existence and scope of the "neutral reportage" privilege: "In other jurisdictions, some state and federal appellate courts have rejected the privilege entirely, while courts that have adopted it have disagreed as to its elements." [5] Appx. A, p. 18a (citations omitted). The California Supreme Court also noted that "[c]ommentators are similarly divided, with some arguing that the privilege is inconsistent with the United States Supreme Court's First Amendment jurisprudence and therefore should be rejected, and others endorsing the privilege in concept but taking differing positions about how it should be de-

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[5] Decisions recognizing a neutral reportage privilege include: *Price v. Viking Penguin Inc.*, 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); *Sunshine Sportswear & Electronics v. WSOC Tele., Inc.*, 738 F. Supp. 1499 (D.S.C. 1989); *Burns v. Times Argus*, 430 A.2d 773 (Vt. 1981); *Blair v. Palm Beach Newspapers*, 8 Med. L. Rep. 2028 (Fla. 5th Cir. 1982), *aff'd*, 444 So.2d 1131 (Fla. 4th Dist. Ct. App. 1984).

The intermediate courts in Illinois are split on the issue (*see Fogus v. Capital Cities Media, Inc.*, 444 N.E.2d 1100, 1102 (Ill. App. 1982)), and the Illinois Supreme Court has declined to rule upon the issue (*see Catalano v. Pechous*, 419 N.E.2d 350, 361 (Ill. 1980), *cert. denied*, 451 U.S. 911 (1981)).

Decisions rejecting a neutral reportage privilege include: *Dickey v. CBS, Inc.*, 588 F.2d 1221 (3d Cir. 1978), questioned in *Medico v. Time, Inc.*, 643 F.2d 134, 145 (3d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981); *McCall v. Courier Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981); *Janklow v. Viking Press*, 378 N.W.2d 875 (S. Dak. 1985); *Postill v. Booth Newspapers, Inc.*, 325 N.W.2d 511 (Mich. App. 1982).

fined."[6] Appx. A, p. 18a. *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 660 n.1 (1989) (noting that the petitioner therein had abandoned the defense of neutral reportage, and that therefore the issue was not before the Court); *see also Harte-Hanks*, 491 U.S. at 694 (Blackmun, J., concurring).

Ultimately, the California Supreme Court held that " 'in California there is no neutral reportage privilege extending to reports regarding *private figures.*' " Appx. A, p. 24a (emphasis added). However, if (as discussed above) Khawar was a public figure for the limited purpose of media reports about the Morrow book's allegations, then the issue remains whether there should be a "neutral reportage" privilege and, if so, what the scope of the privilege might be. (Moreover, as the California Supreme Court acknowledged, there is a split of opinion as to whether the neutral reportage opinion should apply to

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[6] Commentators opposing a neutral reportage privilege include: Comment, *Edwards v. National Audubon Society, Inc.: A Constitutional Privilege to Republish Defamation Should Be Rejected* (1982) 33 Hastings L.J. 1203.

Commentators endorsing a neutral reportage privilege include: Note, *The Developing Privilege of Neutral Reportage* (1983) 69 Va. L. Rev. 853; Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage* (1991) 13 Hastings Comm. & Ent. L.J. 455; Note, *The Newsworthiness Requirement of the Privilege of Neutral Reportage Is a Matter of Public Concern* (1996) 65 Fordham L. Rev. 789; Comment, *Neutral Reportage: Making Sense of Edwards v. National Audubon Society, Inc.* (1991) 20 Cap. U. L. Rev. 471; McCraw, *The Right to Republish Libel: Neutral Reportage and the Reasonable Reader* (1991) 25 Akron L. Rev. 335; Comment, *Price v. Viking Penguin, Inc.: The Neutral Reportage Privilege and Robust, Wide Open Debate* (1990) 75 Minn. L. Rev. 157; Comment, *Restricting the First Amendment Right to Republish Defamatory Statements* (1981) 50 Geo. L.J. 1495.

reports of an accusation made by a public figure regarding a private figure.)[7]

Resolving the issues surrounding the "neutral reportage" privilege is of crucial importance to the First Amendment. The time has come to resolve the split in the courts on the existence of the "neutral reportage" privilege. Until this conflict is resolved, the media's First Amendment protection will depend solely on the state in which a plaintiff is located. This conflict should be resolved.

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[7] The California Supreme Court stated:

> Some commentators have argued that the privilege should apply to a published report of an accusation that a public figure has made against a private figure because "the public has a greater interest in knowing what its public figures are saying than it does in protecting private figures from accusations by public figures." . . . Under this view, the neutral reportage privilege would protect the Globe article, even though it reported a false and defamatory accusation against a private figure (that is, Khawar), if the person who made the original accusation (that is, Morrow) was a public figure.
>
> Because we do not accept this view of the neutral reportage privilege, we do not decide whether Morrow was a public figure. We find more persuasive the arguments of other commentators that republication of accusations made against private figures are never protected by the neutral reportage privilege, whether or not the person who made the original accusation was a public figure.

Appx. A, pp. 21a-22a; *see* Appx. A, pp. 20a-21a, n.4 (discussing state court decisions expanding privilege to include defamation of private figures).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Filed November 2, 1998;
as modified on December 22, 1998]

IN THE SUPREME COURT
OF CALIFORNIA

S054868

Ct. App. 2/7 B084899

Los Angeles County
Super. Ct. No. WEC139685

KHALID IQBAL KHAWAR,
Plaintiff and Respondent,

v.

GLOBE INTERNATIONAL, INC.,
Defendant and Appellant.

ALI AHMAD,
Plaintiff and Appellant,

v.

GLOBE INTERNATIONAL, INC.,
Defendant and Respondent.

We granted review to decide certain issues concerning the federal Constitution's guarantees of freedom of speech and of the press insofar as they restrict a state's ability to impose tort liability for the publication of defamatory falsehoods. More specifically, we address the definition of a "public figure" for purposes of tort and First Amendment law, the existence in this state of a privilege for "neutral reportage," and the showings required to support awards of compensatory and punitive damages for the republication of a defamatory falsehood.

On these issues, we conclude: (1) A young journalist who was photographed near a nationally prominent politician moments before the politician's assassination, but who was never a suspect in the government's investigation of the assassination, whose views on the assassination were never publicized, and who never sought to influence public discussion about the assassination, was not a public figure in relation to a tabloid newspaper's article reporting a book's false accusation that the journalist assassinated the politician; (2) this state does not recognize a neutral reportage privilege for republication of a libel concerning a private figure (and we need not and do not decide here whether this state recognizes a neutral reportage privilege for republication of a libel concerning a public official or public figure); and (3) the evidence produced at the trial in this case supports the jury's findings of negligence and actual malice, which in turn support the awards of compensatory and punitive damages.

I. FACTS

In November 1988, Roundtable Publishing, Inc., (Roundtable) published a book written by Robert Morrow (Morrow) and entitled The Senator Must Die: The Murder of Robert Kennedy (the Morrow book). The Morrow book

alleged that the Iranian Shah's secret police (SAVAK), working together with the Mafia, carried out the 1968 assassination of United States Senator Robert F. Kennedy (Kennedy) in California and that Kennedy's assassin was not Sirhan Sirhan, who had been convicted of Kennedy's murder (see *People* v. *Sirhan* (1972) 7 Cal.3d 710), but a man named Ali Ahmand, whom the Morrow book described as a young Pakistani who, on the evening of the Kennedy assassination, wore a gold-colored sweater and carried what appeared to be a camera but was actually the gun with which Ahmand killed Kennedy. The Morrow book contained four photographs of a young man the book identified as Ali Ahmand standing in a group of people around Kennedy at the Ambassador Hotel in Los Angeles shortly before Kennedy was assassinated.

Globe International, Inc., (Globe) publishes a weekly tabloid newspaper called Globe. Its issue of April 4, 1989, contained an article on page 9 under the headline: *Former CIA Agent Claims: IRANIANS KILLED BOBBY KENNEDY FOR THE MAFIA* (the Globe article). Another headline, appearing on the front page of the same issue, stated: *Iranian secret police killed Bobby Kennedy.* The Globe article, written by John Blackburn (a freelance reporter and former Globe staff reporter), gave an abbreviated, uncritical summary of the Morrow book's allegations. The Globe article included a photograph from the Morrow book showing a group of men standing near Kennedy; Globe enlarged the image of these individuals and added an arrow pointing to one of these men and identifying him as the assassin Ali Ahmand.

In August 1989, Khalid Iqbal Khawar (Khawar) brought this action against Globe, Roundtable, and Morrow, alleging that he was the person depicted in the photographs and identified in the Morrow book as Ali Ahmand,

and that the book's accusation, repeated in the Globe article, that he had assassinated Kennedy was false and defamatory and had caused him substantial injury. Three months later, Khawar's father, Ali Ahmad (not Ahmand), brought a separate defamation suit against the same defendants and based on the same publications. These two actions were consolidated.

Morrow defaulted, and Roundtable settled with both Khawar and Ahmad before trial. As part of the settlement, Roundtable executed a retraction disavowing "any and all statements, intimations, or references that Khalid Iqbal Khawar or Ali Ahmad were in any way associated with or committed the assassination of United States Senator Robert F. Kennedy." A jury trial ensued on the claims against Globe.

The evidence at trial showed that in June 1968, when Kennedy was assassinated, Khawar was a Pakistani citizen and a free-lance photojournalist working on assignment for a Pakistani periodical. At the Ambassador Hotel's Embassy Room, he stood on the podium near Kennedy so that a friend could photograph him with Kennedy and so that he could photograph Kennedy. He was aware that television cameras and the cameras of other journalists were focused on the podium and that his image would be publicized. When Kennedy left the Embassy Room, Khawar did not follow him; Khawar was still in the Embassy Room when Kennedy was shot in the hotel pantry area. Both the Federal Bureau of Investigation (FBI) and the Los Angeles Police Department questioned Khawar about the assassination, but neither agency ever regarded him as a suspect.

In April 1989, 21 years later, when the Globe article was published, Khawar was a naturalized United States

citizen living with his wife and children in Bakersfield, California, where he owned and operated a farm. His father, Ali Ahmad, had likewise become a naturalized United States citizen and settled in Bakersfield. After Khawar read the Globe article, he became very frightened for his own safety and that of his family. He received accusatory and threatening telephone calls about the article from as far away as Thailand, he and his children received death threats, and his home and his son's car were vandalized. A Bakersfield television station interviewed Khawar about the Globe article.

The trial court granted Globe's motion for nonsuit as to Ahmad on the ground that the allegedly defamatory statements in the Globe article were not "of and concerning" Ahmad. As to Khawar, the jury returned, among others, these special verdicts: (1) the Globe article contained statements about Khawar that were false and defamatory; (2) Globe published the article negligently and with malice or oppression; (3) with respect to Kennedy's assassination, Khawar was a private rather than a public figure; and (4) the Globe article was a neutral and accurate report of the Morrow book. The parties had previously agreed that the jury's findings on the last two issues would be advisory only. The jury awarded Khawar $100,000 for injury to his reputation, $400,000 for emotional distress, $175,000 in presumed damages, and, after a separate punitive damages phase, $500,000 in punitive damages.

After the return of these special verdicts, the trial court reviewed those that were deemed advisory and determined as a matter of law that (1) the Globe article was *not* an accurate and neutral report of the statements and charges made in the Morrow book (thus disagreeing with and rejecting the jury's advisory special verdict); and (2) with respect to the events in question, Khawar was a private

and not a public figure (thus agreeing with and adopting the jury's advisory special verdict). The trial court's finding that the Globe article was not an accurate and neutral report of the Morrow book was apparently based on the court's subsidiary finding that although Khawar could be identified from the photograph of him that appeared in the Globe article, which included an arrow pointing directly at Khawar, it was impossible to identify Khawar from the smaller, darker, and less distinct image of him, without an arrow, that appeared in the Morrow book. Based upon its findings that Khawar was not named in and could not be identified from the photographs in the Morrow book, the trial court vacated Morrow's default and ultimately entered judgment in his favor. The court granted judgment on the special verdicts for Khawar and against Globe in the amount of $1,175,000.

Globe appealed from the judgment. The Court of Appeal reached these conclusions: (1) Khawar was not a public figure; (2) California has not adopted a neutral reportage privilege for private figures; (3) in light of these conclusions, it was unnecessary to decide whether California has adopted a neutral reportage privilege for public figures or whether the Globe article was a neutral and accurate report of the Morrow book; and (4) the evidence supported the trial court's findings of negligence and actual malice. The Court of Appeal affirmed the judgment.

We granted Globe's petition for review raising these issues: (1) When a published book places a person at the center of a public controversy, is that person an involuntary public figure for the limited purpose of a media report about that book and that controversy? (2) Does the First Amendment to the federal Constitution mandate a privilege for a media defendant's publication of a neutral and accurate report about a controversial book's allega-

tions regarding matters of public concern? (3) Does the evidence support the jury's special verdict finding of actual malice? (4) Does the evidence support the jury's special verdict finding of negligence? (5) Did the trial court usurp the jury's role and violate Globe's right to due process of law when it determined the Globe article to be an "original libel" without giving Globe the opportunity to be heard or present evidence on that issue?

II. PUBLIC FIGURE

We consider first Globe's contention that the trial court and the Court of Appeal erred in concluding that Khawar is a private rather than a public figure for purposes of this defamation action.

A. Background

The federal Constitution's First Amendment, made applicable to the states by the Fourteenth Amendment (*Near* v. *Minnesota* (1931) 283 U.S. 697, 707), guarantees freedom of speech and of the press. In *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, the United States Supreme Court for the first time construed these constitutional guarantees as imposing limitations on a state's authority to award damages for libel. Specifically, the court held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (*Id.* at pp. 279-280.) The court later explained that the publisher of a defamatory statement acts with reckless disregard amounting to actual malice if, at the time of publication, the publisher "in fact entertained serious doubts as to the truth of his pub-

lication." (*St. Amant* v. *Thompson* (1968) 390 U.S. 727, 731.) In *Curtis Publishing Co.* v. *Butts* (1967) 388 U.S. 130, 134, the high court held that this "actual malice" requirement for defamation actions brought by public officials applied also to defamation actions brought by "public figures."

In *Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323 (*Gertz*), the court explained that it had imposed the actual malice requirement on defamation actions by both public officials and public figures because such persons "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy" (*id.* at p. 344) and because they "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them" (*id.* at p. 345). Concerning the latter justification, the court stated: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." (*Ibid.*)

The court then explained that there are two types of public figures: "Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." (*Gertz, supra*, 418 U.S. 323, 345.) The court reiterated the distinction in these words: "[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More com-

monly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." (*Id.* at p. 351.)

The court contrasted these two types of public figures—the all purpose public figure and the limited purpose public figure—with an ordinary private individual: "He [the private individual] has not accepted public office or assumed an 'influential role in ordering society.' [Citation.] He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." (*Gertz, supra*, 418 U.S. 323, 345.) The court declined to impose the actual malice requirement on the recovery of damages for actual injury caused to a private figure by the publication of a defamatory falsehood. (*Id.* at pp. 345-348.)

In three later decisions, the United States Supreme Court has applied this form of analysis, similarly concluding in each that a plaintiff in a libel action was a private rather than a public figure. (*Wolston* v. *Reader's Digest Ass'n, Inc.* (1979) 443 U.S. 157, 166-169 (*Wolston*); *Hutchinson* v. *Proxmire* (1979) 443 U.S. 111, 133-136; *Time, Inc.* v. *Firestone* (1976) 424 U.S. 448, 451-455.)

B. Analysis

We begin with the standard of review. At trial, whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. (*Reader's Digest Assn.* v. *Superior Court* (1984) 37 Cal.3d 244, 252; *Tavoular-*

eas v. *Piro* (D.C. Cir. 1987) 817 F.2d 762, 772; see Smolla, Law of Defamation (10th ed. 1996) § 2.29[2], p. 2-101.) On appeal, the trial court's resolution of disputed factual questions bearing on the public figure determination is reviewed for substantial evidence, while the trial court's resolution of the ultimate question of public figure status is subject to independent review for legal error. (See *Wolston, supra*, 443 U.S. 157, 166-168 [apparently applying these standards]; *Gertz, supra*, 418 U.S. 323, 352 [same]; *Reader's Digest Assn.* v. *Superior Court, supra*, 37 Cal.3d 244, 255-256 [same].)

Applying the standard here, we note, first, that Globe does not contend that Khawar is a public figure for all purposes but merely that he is a public figure for limited purposes relating to particular public controversies. Globe's main argument appears to be that publication of the Morrow book drew Khawar into public controversies surrounding Kennedy's assassination and that Khawar is therefore an involuntary public figure for the limited purpose of a report on that book. In making this argument, Globe relies on the language in *Gertz, supra*, 418 U.S. 323, that it is possible for a person "to become a public figure through no purposeful action of his own" (*id.* at p. 345) and that a person can become a public figure by being "drawn into a particular public controversy" (*id.* at p. 351). Thus, Globe concedes, at least for purposes of this one argument, that Khawar did not intentionally thrust himself into the vortex of any public controversy.

We find Globe's argument unpersuasive because characterizing Khawar as an involuntary public figure would be inconsistent with the reasons that the United States Supreme Court has given for requiring public figures to prove actual malice in defamation actions. As we have explained, the high court imposed the actual malice require-

ment on defamation actions by public figures and public officials for two reasons: they have media access enabling them to effectively defend their reputations in the public arena; and, by injecting themselves into public controversies, they may fairly be said to have voluntarily invited comment and criticism. (*Gertz, supra*, 418 U.S. 323, 344-345.) By stating that it is theoretically possible to become a public figure without purposeful action inviting criticism (*id.* at p. 345), the high court has indicated that purposeful activity may not be essential for public figure characterization. But the high court has never stated or implied that it would be proper for a court to characterize an individual as a public figure in the face of proof that the individual had neither engaged in purposeful activity inviting criticism nor acquired substantial media access in relation to the controversy at issue. We read the court's decisions as precluding courts from affixing the public figure label when neither of the reasons for applying that label has been demonstrated. Thus, assuming a person may ever be accurately characterized as an *involuntary* public figure, we infer from the logic of *Gertz* that the high court would reserve this characterization for an individual who, despite never having voluntarily engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements.

We find in the record no substantial evidence that Khawar acquired sufficient media access in relation to the controversy surrounding the Kennedy assassination or the Morrow book to effectively counter the defamatory falsehoods in the Globe article. After the assassination and before publication of the Morrow book, no reporter con-

tacted Khawar to request an interview about the assassination. Nor was there any reason for a reporter to do so: Khawar was not a suspect in the investigation, he did not testify at the trial of the perpetrator of the assassination, and, so far as the record shows, his own views about the assassination were never publicized.

Nothing in the record demonstrates that Khawar acquired any significant media access as a result of publication of either the Morrow book or the other book, RFK Must Die (1970) by Robert Blair Kaiser, in which, according to Globe, questions were raised about Khawar's activities in relation to the assassination. There is no evidence that either book enjoyed substantial sales or was reviewed in widely circulated publications. Indeed, the evidence showed that when the Globe article appeared, Roundtable had sold only 500 of the 25,000 printed copies of the Morrow book, and that although Roundtable had sent 150 copies of the Morrow book to various media entities, only Globe published a report concerning it. Before publication of the Globe article, no reporter contacted Khawar to interview him about either book, and he remained unaware of their publication.

The interview by the Bakersfield television station, which was the only interview in which Khawar ever participated that related in any way to the Kennedy assassination, the Morrow book, or the Globe article, occurred *after and in response to* the publication of the Globe article. Although this single interview demonstrates that Khawar enjoyed some media access, it is only the media access that would likely be available to any private individual who found himself the subject of sensational and defamatory accusations in a publication with a substantial nationwide circulation. (Globe distributed more than 2.7 million copies of the issue containing the Globe article.) If such ac-

cess were sufficient to support a public figure characterization, any member of the media—any newspaper, magazine, television or radio network or local station—could confer public figure status simply by publishing sensational defamatory accusations against any private individual. This the United States Supreme Court has consistently declined to permit. As the court has repeatedly said, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (*Hutchinson* v. *Proxmire, supra,* 443 U.S. 111, 135; see Smolla, Law of Defamation, *supra,* § 2.10, p. 2-34; see also *Brown* v. *Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 752-753.)

Although Globe's primary argument is that publication of the Morrow book made Khawar an involuntary public figure, Globe may be understood to argue further that Khawar's involvement with the Kennedy assassination controversies was not entirely involuntary because, immediately before the assassination, Khawar sought and obtained a position close to Kennedy on the podium knowing that there would be substantial media coverage of the event. For a variety of reasons, this conduct does not demonstrate that Khawar voluntarily elected to encounter an increased risk of injury from defamatory falsehoods in publications like the Globe article.

First, Khawar's conduct occurred before any relevant controversy arose. The controversies discussed in the Globe article related to Kennedy's assassination and the particular theory concerning it that was proposed in the Morrow book. Khawar's conduct in standing near Kennedy at the hotel was not a voluntary association with either of those controversies because the conduct occurred before the assassination and before the Morrow book's publication. Khawar did not know, nor should he have

known, that Kennedy would be assassinated moments later, much less that a book would be published 20 years thereafter containing the theory proposed in the Morrow book. We do not disagree with Globe that Kennedy's campaign for his party's nomination to the presidency may be described as a public issue or controversy, nor do we disagree that Khawar voluntarily associated himself with this public issue or controversy by allowing himself to be photographed with Kennedy at a campaign press conference. But these facts have no legal significance for purposes of this libel action. The subject of the Globe article was not Kennedy's candidacy as such, but rather Kennedy's assassination and the theory put forward in the Morrow book.

Second, even as to the public issues or controversies relating to Kennedy's candidacy, the role in these controversies that Khawar voluntarily assumed by standing near Kennedy on the podium was trivial at best. As the United States Supreme Court has stressed, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." (*Wolston, supra*, 443 U.S. 157, 167.) Khawar's conduct in standing near Kennedy foreseeably resulted in his being photographed with Kennedy, but a journalist who is photographed with other journalists crowded around a political candidate does not thereby assume any special prominence in relation to the political campaign issues.

Third, appearing on the podium was not conduct by which Khawar "engaged the attention of the public *in an attempt to influence* the resolution of the issues involved." (*Wolston, supra*, 443 U.S. 157, 168, italics added.) Khawar, who was an admirer of Kennedy, wanted to be photographed with Kennedy because the resulting photo-

graphs would have a strictly personal value as souvenirs. Khawar did not anticipate, nor did he have reason to anticipate, that inclusion of his image would make the photographs more newsworthy or would in any way affect the resolution of any public issue related to Kennedy's run for the presidency. In brief, by appearing in close proximity to Kennedy, Khawar did not engage in conduct that was "calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue." (*Ibid.*)

Having concluded that Khawar did not voluntarily elect to encounter an increased risk of media defamation and that before publication of the Globe article he did not enjoy media access sufficient to prevent resulting injury to his reputation, we agree with the trial court and the Court of Appeal that, for purposes of this defamation action, Khawar is a private rather than a public figure.

III. NEUTRAL REPORTAGE PRIVILEGE

Globe contends that the trial court and the Court of Appeal erred in holding that the neutral reportage privilege does not apply to insulate from defamation liability its republication of the Morrow book's defamatory falsehoods.

A. Background

At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. (See Rest.2d Torts, § 578.) California has adopted the common law in this regard (*Frommoethelydo* v. *Fire Ins. Exchange* (1986) 42 Cal.3d 208, 217; *Gilman* v. *McClatchy* (1896) 111 Cal. 606,

612), although by statute the republication of defamatory statements is privileged in certain defined situations (see, e.g., Civ. Code, § 47).

In a 1977 decision, a federal appellate court held that, under certain circumstances, as an exception to the common law republication rule, the federal Constitution's First Amendment mandates an absolute privilege for the republication of defamatory statements. (*Edwards* v. *National Audubon Society, Inc.* (2d Cir. 1977) 556 F.2d 113, cert. den. 434 U.S. 1002 (*Edwards*).) This privilege has since come to be known as the neutral reportage privilege. The *Edwards* court defined the privilege this way: "[W]hen a *responsible, prominent organization* . . . makes serious charges against a *public figure,* the First Amendment protects the *accurate and disinterested reporting* of those charges, regardless of the reporter's private views regarding their validity." (*Id.* at p. 120, italics added.)[1]

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[1] The neutral reportage privilege to some extent resembles and overlaps the common law privilege of "fair report," which California has codified in Civil Code section 47, subdivisions (d) and (e) (see *Kilgore* v. *Younger* (1982) 30 Cal.3d 770, 776) and also the "wire service defense," which has been adopted by some courts in other jurisdictions (see *Appleby* v. *Daily Hampshire Gazette* (1985) 395 Mass. 32 [478 N.E.2d 721]; *Brown* v. *Courier Herald Pub. Co., Inc.* (S.D. Ga. 1988) 700 F.Supp. 534; *Layne* v. *Tribune Co.* (1933) 108 Fla. 177 [146 So. 234]) but has yet to be considered by any published decision of a court of this state. Globe does not argue that either the statutory fair report privilege or the wire service defense immunizes it from liability to Khawar for damages occasioned by publication of the Globe article. Accordingly, we have no occasion to consider application of Civil Code section 47 to the circumstances of this case.

Also, because Globe conceded at trial that the Globe article was not a book review, we have no occasion here to consider whether republication of a defamatory statement in the context of a book review would require a different anaysis or result.

The theory underlying the privilege is that the reporting of defamatory allegations relating to an existing public controversy has significant informational value for the public regardless of the truth of the allegations: If the allegations are true, their reporting provides valuable information about the target of the accusation; if the allegations are false, their reporting reflects in a significant way on the character of the accuser. In either event, according to the theory, the very making of the defamatory allegations sheds valuable light on the character of the controversy (its intensity and perhaps viciousness). As we understand it, the theory also rests on a distinction between publication and republication. Applying this distinction, proponents of the neutral reportage privilege urge that the reporting of a false and defamatory accusation should be deemed neither defamatory nor false if the report accurately relates the accusation, makes it clear that the republisher does not espouse or concur in the accusation, and provides enough additional information (including, where practical, the response of the defamed person) to allow the readers to draw their own conclusions about the truth of the accusation.

The United States Supreme Court has not stated whether it agrees with this theory, and it has never held that the First Amendment mandates a neutral reportage privilege (see *Harte-Hanks Communications* v. *Connaughton* (1989) 491 U.S. 657, 660, fn. 1 [declining to decide the issue]). Nor have we ever addressed the question whether the neutral reportage privilege will be recognized in this state.[2]

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[2] In some published decisions, our state Courts of Appeal have mentioned the neutral reportage privilege as a doctrine proposed or adopted in other jurisdictions (e.g., *Stockton Newspapers, Inc.* v. *Superior Court* (1988) 206 Cal.App.3d 966, 981, fn. 6) or have quoted language relating to the privilege from *Edwards, supra,*

In other jurisdictions, some state and federal appellate courts have rejected the privilege entirely (*Dickey* v. *CBS, Inc.* (3d Cir. 1978) 583 F.2d 1221, 1225-1226; *McCall* v. *Courier-Journal & Louisville Times* (Ky. 1981) 623 S.W.2d 882; *Postill* v. *Booth Newspapers, Inc.* (1982) 118 Mich.App. 608 [325 N.W.2d 511]; *Hogan* v. *Herald Co.* (N.Y.App.Div. 1982) 446 N.Y.S.2d 836, 842), while courts that have adopted it have disagreed as to its elements (compare, e.g., *Martin* v. *Wilson Pub. Co.* (R.I. 1985) 497 A.2d 322, 330 [stating that privilege applies "only in the extremely limited situation in which the publication accurately attributes such statements to an identified and responsible source"] with *Barry* v. *Time Inc.* (1984) 584 F.Supp. 1110, 1125-1127 [applying privilege to report of accusations made by other than a "responsible" person or organization]).

Commentators are similarly divided, with some arguing that the privilege is inconsistent with the United States Supreme Court's First Amendment jurisprudence and therefore should be rejected (Comment, *Edwards* v. *National Audubon Society, Inc.: A Constitutional Privilege to Republish Defamation Should Be Rejected* (1982) 33 Hastings L.J. 1203), and others endorsing the privilege in concept but taking differing positions about how it should be defined (compare, e.g., Note, *The Developing Privilege of Neutral Reportage* (1983) 69 Va. L. Rev. 853 [would require that the target be a public figure or official, that the report relate to a preexisting public controversy, that the report not concur in or endorse the defamation,

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556 F.2d 113, while deciding distinct issues (e.g., *Grillo* v. *Smith* (1983) 144 Cal.App.3d 868, 872 [holding that allegedly defamatory statements were opinion]; *Weingarten* v. *Block* (1980) 102 Cal.App.3d 129, 148 [holding evidence insufficient to demonstrate actual malice]). But to our knowledge there is no published decision in which a Court of Appeal of this state has held that the neutral reportage privilege is required by either the federal or the state Constitution or otherwise is recognized in this state.

and that the report be fair and accurate], with Boasberg, *With Malice Toward None: A New Look at Defamatory Republican and Neutral Reportage* (1991) 13 Hastings Comm. & Ent. L.J. 455 [would not require that report be neutral or that source be responsible and would recognize privilege if either source or target is a public figure).[3]

B. Analysis

Without deciding whether some form of the neutral reportage privilege should be recognized in this state, the Court of Appeal in this case declined to apply the neutral

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[3] For a sampling of the legal literature on this topic, see Note, *The Newsworthiness Requirement of the Privilege of Neutral Reportage Is a Matter of Public Concern* (1996) 65 Fordham L. Rev. 789 [would require that report relate to a matter of public concern, rather than merely a matter that is newsworthy]; Comment, *Neutral Reportage: The Case for a Statutory Privilege* (1992) 86 Nw. U. L. Rev. 417 [would require accurate reporting of an accusation relating to a matter of public interest either by or about a public official or public figure and available means of redress to the accusation's target]; Comment, *Neutral Reportage: Making Sense of Edwards* v. *National Audubon Society, Inc.* (1991) 20 Cap. U.L. Rev. 471 [would require a public controversy, serious charges made by a party to that controversy against another party to that controversy, and accurate and fair report, but would not require that the target be a public official or public figure or that the accuser be prominent or responsible]; McCraw, *The Right to Republish Libel: Neutral Reportage and the Reasonable Reader* (1991) 25 Akron L. Rev. 335 [would require that target be public figure or official and that report accurately reflect the reporter's knowledge about the validity of the accusations]; Comment, *Price* v. *Viking Penguin, Inc.: The Neutral Reportage Privilege and Robust, Wide Open Debate* (1990) 75 Minn. L. Rev. 157 [would require accurate reporting of accusations relating to matter of public concern, but would not require that either accuser or target be public figures or official, that accuser be prominent or responsible, or that the report be neutral, so long as the report does not adopt the accusation as its own]; Comment, *Restricting the First Amendment Right to Republish Defamatory Statements* (1981) 69 Geo. L.J. 1495 [would extend privilege to serious and credible accusations by private figures against public figures and public officials].

reportage privilege on the ground that Khawar is a private figure. Globe argues that this conclusion is erroneous either because Khawar is a public figure or because the neutral reportage privilege extends to defamatory falsehoods about private figures. In concluding that Khawar is a private figure, we have already rejected the first of these grounds. We now consider the second.

Because the United States Supreme Court has never held that the First Amendment requires recognition of a neutral reportage privilege, the very existence of the privilege as a matter of constitutional law is uncertain. Deciding whether either the federal or the state Constitution mandates some form of neutral reportage privilege is a task that we leave for another day. Even if some form of the privilege is constitutionally required, we are satisfied that any required privilege would not immunize defamatory statements about private figures like Khawar.

As originally articulated in *Edwards, supra,* 556 F.2d 113, the constitutional neutral reportage privilege applies only to publications of defamatory statements concerning public officials or public figures. (*Id.* at p. 120.) Among the courts that recognize the privilege in one form or another, almost all acknowledge this limitation.[4] For

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[4] One district of the Illinois Appellate Court has stated that the privilege applied to "'items of information relating to public issues, personalities, or programs,'" thus expanding the privilege to include defamation of private figures. (*Gist* v. *Macon County Sheriff's Department* (1996) 284 Ill.App.3d 367, 379 [671 N.E.2d 1154, 1162]; *Krauss* v. *Champaign News Gazette, Inc.* (1978) 59 Ill.App.3d 745, 747 [375 N.E.2d 1362, 1363].) But another district of the Illinois Appellate Court has declined to recognize the neutral reportage privilege in any form. (*Tunney* v. *American Broadcasting Co.* (1982) 109 Ill.App.3d 769 [441 N.E.2d 86]; *Newell* v. *Field Enterprises, Inc.* (1980) 91 Ill.App.3d 737, 757 [415 N.E.2d 434, 452].) The Illinois Supreme Court has declined

example, the federal Court of Appeals for the Tenth Circuit declined to apply the neutral reportage privilege to a defamation action by a private figure, stating: "The protections afforded the press when it reports on public officials and public figures do not shield it from liability when it publishes defamatory statements concerning private individuals." (*Dixson* v. *Newsweek, Inc.* (10th Cir. 1977) 562 F.2d 626, 631; see also *Crane* v. *Arizona Republic* (C.D. Cal. 1989) 729 F.Supp. 698, 710, affd. in part, vacated in part (9th Cir. 1992) 972 F.2d 1511.)

Some commentators have argued that the privilege should apply to a published report of an accusation that a public figure has made against a private figure because "the public has a greater interest in knowing what its public figures are saying than it does in protecting private figures from accusations by public figures." (Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage, supra,* 13 Hastings Comm. & Ent. L.J. 455, 483.) They reason like this: "Through an understanding of who is saying what, public figures may be analyzed more insightfully, their statements reflecting as much about themselves as they do about the target. Inevitably, the conflicting interests are considered in a balancing test. It is more important to refrain from chilling republication of speech made by public figures,

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to resolve this conflict. (See *Catalano* v. *Pechous* (1980) 83 Ill.2d 146, 170 [419 N.E.2d 350, 362].)

In Ohio, one intermediate appellate court said it perceived "no legitimate difference between the press's accurate reporting of accusations made against a private figure and those made against a public figure, when the accusations themselves are newsworthy and concern a matter of public interest." (*April* v. *Reflector-Herald, Inc.* (1988) 46 Ohio App.3d 95, 98 [546 N.E.2d 466, 469].) But since that decision, the Ohio Supreme Court has expressly declined to recognize the neutral reportage privilege in any form. (*Young* v. *The Morning Journal* (1996) 76 Ohio St.3d 627, 629 [669 N.E.2d 1136, 1138].)

often the political speech at the core of the first amendment, than to protect the reputations of private figure targets." (*Id.* at pp. 483-484; see also Comment, *Neutral Reportage: Making Sense of Edwards v. National Audobon Society, Inc., supra,* 20 Cap. U. L.Rev. 471, 493.) Under this view, the neutral reportage privilege would protect the Globe article, even though it reported a false and defamatory accusation against a private figure (that is, Khawar), if the person who made the original accusation (that is, Morrow) was a public figure.

Because we do not accept this view of the neutral reportage privilege, we do not decide whether Morrow was a public figure. We find more persuasive the arguments of other commentators that republication of accusations made against private figures are never protected by the neutral reportage privilege, whether or not the person who made the original accusation was a public figure. These commentators explain that although the public has a legitimate interest in knowing that prominent individuals have made charges, perhaps unfounded, against a private figure, recognition of an *absolute privilege* for the republication of those charges would be inconsisent with the United States Supreme Court's insistence on the need for balancing the First Amendment interest in promoting the broad dissemination of information relevant to public controversies against the reputation interests of private figures: "If the scope of the privilege were to include defamations of private figures, a neutral reportage route out of liability could emasculate the *Gertz*[, *supra,* 418 U.S. 323] distinction between private and public figure plaintiffs." (Note, *The Developing Privilege of Neutral Reportage, supra,* 69 Va. L.Rev. 853, 871; see also McCraw, *The Right to Republish Libel: Neutral Reportage and the Reasonable Reader, supra,* 25 Akron L.Rev. 335, 363 [Stating the public figure requirement "has been con-

sistently upheld, offers reputational protection to those who do not voluntarily involve themselves in public matters, and is consistent with Supreme Court jurisprudence from [*New York Times* v. *Sullivan, supra,* 376 U.S. 254] on."]; see also Comment, *Constitutional Privilege to Republish Defamation* (1977) 77 Colum. L. Rev. 1266, 1278, fns. omitted.)

We agree. Only rarely will the report of false and defamatory accusations against a person who is neither a public official nor a public figure provide information of value in the resolution of a controversy over a matter of public concern. On the other hand, the report of such accusations can have a devastating effect on the reputation of the accused individual, who has not voluntarily elected to encounter an increased risk of defamation and who may lack sufficient media access to counter the accusations. As this court has remarked, "[a] reasonable degree of protection for a private individual's reputation is essential to our system of ordered liberty." (*Brown* v. *Kelly Broadcasting Co., supra,* 48 Cal.3d 711, 743.) The availability of a defamation action against the source of the falsehood may be an inadequate remedy if the source is insolvent or otherwise unable to respond in damages. Moreover, it is questionable whether money damages are ever a completely adequate compensation for injury to reputation.

Khawar is a private figure, and, as pointed out above, most jurisdictions (and law review commentators) that recognize a neutral reportage privilege agree that it should extend only to defamatory statements made about public figures or public officials. In concluding that the neutral reportage privilege is unavailable here because Khawar is a private figure, we do not decide or imply either that the neutral reportage privilege exists as to republished defamations about public figures or that Globe

established other possible requirements of the privilege here. In particular, we do not decide whether Morrow, the source of the false and defamatory accusation, is a public figure. Nor do we decide whether the Globe article's report of the accusation was neutral or fair, or whether the Globe article would appear to a normal reader to have concurred in or espoused the false and defamatory accusation. We hold only that the Court of Appeal did not err when it concluded that "in California there is no neutral reportage privilege extending to reports regarding private figures." [5]

IV. OTHER ISSUES

Globe raises three other, more fact-specific issues. It contends: (1) the Court of Appeal erred in holding that the evidence presented at trial is sufficient to support the jury's finding of actual malice; (2) the Court of Appeal erred in holding that the evidence is sufficient to support the jury's finding of negligence; and (3) the trial court erred in injecting an "original libel" theory into the case at trial. We consider these contentions in turn.

A. Actual Malice

The First Amendment to the federal Constitution, as authoritatively construed by the United States Supreme Court, does not require a private figure plaintiff to prove actual malice to recover damages for actual injury caused by publication of a defamatory falsehood. (*Gertz, supra,* 418 U.S. 323, 347.) Rather, in this situation, the individual states may define the appropriate standard of

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[5] A few days before oral argument in this court, Globe submitted a request for judicial notice of two newspaper articles concerning a recently published book about the life of President John F. Kennedy. Because the articles have no relevance to the issues we decide here, we deny the requst.

liability for defamation, provided they do not impose liability without fault. (*Ibid.*; see also *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 761 (plur. opn. of Powell, J.); *id.* at p. 764 (conc. opn. of Burger, C.J.); *id.* at p. 774 (conc. opn. of White, J.) [private figure plaintiff need not prove actual malice to recover presumed or punitive damages if the defamatory publication was not on a matter of public concern].) In California, this court has adopted a negligence standard for private figure plaintiffs seeking compensatory damages in defamation actions. (*Brown* v. *Kelly Broadcasting Co., supra*, 48 Cal.3d 711, 742.)

There is a different rule, however, for recovery of either punitive damages or damages for presumed injury. The United States Supreme Court has held that to recover such damages, even a private figure plaintiff must prove actual malice if the defamatory statement involves matters of public concern. (*Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc., supra*, 472 U.S. 749, 761 (plur. opn. of Powell, J.); *id.* at p. 764 (conc. opn. of Burger, C.J.); *id.* at p. 774 (conc. opn. of White, J.); *Gertz, supra*, 418 U.S. 323, 349.) We agree with Globe that the Kennedy assassination is a matter of public concern.

Because in this defamation action Khawar is a private figure plaintiff, he was required to prove only negligence, and not actual malice, to recover damages for actual injury to his reputation. But Khawar was required to prove actual malice to recover punitive or presumed damages for defamation involving the Kennedy assassination. Because Khawar sought punitive and presumed damages as well as damages for actual injury, the issues of both actual malice and negligence were submitted to the jury. The jury found that in publishing the Globe article Globe acted both negligently and with actual malice. Globe challenged both findings on appeal. In this court, Globe

contends that the Court of Appeal erred in rejecting its challenges to these two findings.

We consider first the issue of actual malice. In doing so, we consider only actual malice as defined in decisions of the United States Supreme Court imposing constitutional restrictions on the right to recover damages for defamation. Because Globe has raised no issue concerning proof of malice as defined under state law (see, e.g., Civ. Code, § 48a, subd. 4(d)), we do not address what additional proof requirements, if any, state law may impose.

When a finding of actual malice is challenged on appeal, the reviewing court "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." (*Bose Corp.* v. *Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 514; accord, *Harte-Hanks Communications* v. *Connaughton, supra,* 491 U.S. 657, 686.) This means that although "credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses,' " the reviewing court must "consider the factual record in full" and "must ' "examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." ' " (*Harte-Hanks Communications* v. *Connaughton, supra,* 491 U.S. 657, 688; see also *id.* at p. 690 [accepting credibility determinations necessarily implied by jury's answers to special interrogatories]; *id.* at p. 694 (conc. opn. of White, J., joined by Rehnquist, C.J.).)

Having independently reviewed the full record, we agree with the Court of Appeal that clear and convincing proof supports the jury's finding of actual malice.

In this context, actual malice means that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." (*New York Times Co.* v. *Sullivan, supra*, 376 U.S. 254, 280.) Reckless disregard, in turn, means that the publisher "in fact entertained serious doubts as to the truth of his publication." (*St. Amant* v. *Thompson, supra*, 390 U.S. 727, 731.) To prove actual malice, therefore, a plaintiff must "demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement." (*Bose Corp.* v. *Consumers Union of U.S., Inc., supra*, 466 U.S. 485, 511, fn. 30; see also *McCoy* v. *Hearst Corp.* (1986) 42 Cal.3d 835, 860.)

Actual malice is judged by a subjective standard; otherwise stated, "there must be sufficient evidence to permit the conclusion that the defendant . . . had a 'high degree of awareness of . . . probable falsity.'" (*Harte-Hanks Communications* v. *Connaughton, supra*, 491 U.S. 657, 688.) To prove this culpable mental state, the plaintiff may rely on circumstantial evidence, including evidence of motive and failure to adhere to professional standards. (*Ibid.*; see also *Reader's Digest Assn.* v. *Superior Court, supra*, 37 Cal.3d 244, 257-258.) When, as in this case, a finding of actual malice is based on the republication of a third party's defamatory falsehoods, "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient." (*Harte-Hanks Communications* v. *Connaughton, supra*, 491 U.S. 657, 688.) Nonetheless, the actual malice finding may be upheld " 'where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports' " (*ibid.*), and the republisher failed to interview obvious witnesses who could have confirmed or dis-

proved the allegations (*id.* at p. 682) or to consult relevant documentary sources (*id.* at pp. 683-684 [failure to listen to tape]).

There were, to say the least, obvious reasons to doubt the accuracy of the Morrow book's accusation that Khawar killed Kennedy. The assassination of a nationally prominent politician, in the midst of his campaign for his party's nomination for the presidency, had been painstakingly and exhaustively investigated by both the FBI and state prosecutorial agencies. During this massive investigation, these agencies accumulated a vast quantity of evidence pointing to the guilt of Sirhan as the lone assassin. As a result, Sirhan alone was charged with Kennedy's murder. At Sirhan's trial, "it was undisputed that [Sirhan] fired the shot that killed Senator Kennedy" and "[t]he evidence also established conclusively that he shot the victims of the assault counts." (*People* v. *Sirhan*, *supra*, 7 Cal.3d 710, 717.) The jury returned a verdict finding beyond a reasonable doubt that Sirhan was guilty of first degree murder. On Sirhan's appeal from the resulting judgment of death, this court carefully reviewed the evidence and found it sufficient to sustain the first degree murder conviction. (*Id.* at pp. 717-728.) In asserting that Khawar, and not Sirhan, had killed Kennedy, the Morrow book was making the highly improbable claim that results of the official investigation, Sirhan's trial, and this court's decision on Sirhan's appeal, were all fundamentally mistaken.

Because there were obvious reasons to doubt the accuracy of the Morrow book's central claim, and because that claim was an inherently defamatory accusation against Khawar, the jury could properly conclude that Globe acted with actual malice in republishing that claim if it found also, as it impliedly did, that Globe failed to use readily available means to verify the accuracy of the

claim by interviewing obvious witnesses who could have confirmed or disproved the allegations or by inspecting relevant documents or other evidence. (*Harte-Hanks Communications* v. *Connaughton, supra*, 491 U.S. 657, 682-684.) The evidence at trial supports the jury's implied finding that neither Blackburn (who wrote the Globe article) nor Globe's editors made any such effort.

Preliminarily, we note that this was not a situation in which time pressures made it impossible or impractical to investigate the truth of the accusation. Kennedy had been assassinated in 1968. In November 1988, when Roundtable published the Morrow book, and in April 1989, when Globe published its article, the Kennedy assassination had long ceased to be an issue that urgently engaged the public's attention. Before publishing an article accusing a private figure of a sensational murder, Globe could well have afforded to take the time necessary to investigate the matter with sufficient thoroughness to form an independent judgment before republishing an accusation likely to have a devastating effect on the reputation of the person accused. But Globe did not do so.

Neither Blackburn nor Globe's editors contacted any of the eyewitnesses to the assassination, some of whom were prominent individuals who could easily have been located. At the trial, for example, Roosevelt Grier, a well-known former professional football player and volunteer Kennedy security aide who was present in the pantry area where Kennedy was shot, testified that after the assassination he had remained active in public life and was not "real difficult to find," but that no one from Globe had contacted him. Frank Mankiewicz, Kennedy's press secretary and a witness to the assassination, testified that in 1989, when the Globe article was published, he was vice-chairman of a public relations firm in Washington, D.C., and was listed in the telephone directory for

that city, yet no one from Globe had contacted him. Nor is there any evidence that anyone working for Globe reviewed the voluminous public records of the government investigation of the Kennedy assassination or the Sirhan trial. Indeed, Globe's managing editor, Robert Taylor, conceded during his testimony that Globe made no attempt to independently investigate the truth of any of the statements in the Morrow book. In short, phrasing our conclusion in the language of the United States Supreme Court, "Accepting the jury's determination that [Globe]'s explanations for these omissions were not credible, it is likely that [Globe]'s inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the Morrow book]'s charges." (*Harte-Hanks Communications* v. *Connaughton, supra,* 491 U.S. 657, 692.) As the United States Supreme Court added, "Although failure to investigate will not alone support a finding of actual malice, [citation], the purposeful avoidance of the truth is in a different category." (*Ibid.*)

Globe makes little or no effort to persuade us that the Morrow book's accusations were other than highly implausible or that its own editors tried to verify the truth of these accusations. Instead, Globe points to the jury's advisory special verdict finding that the Globe article was a neutral and accurate report of the Morrow book. Globe observes that the jury was instructed to return this special verdict only if it made a subsidiary finding that Morrow was a prominent and responsible source. Globe argues generally that it had no duty to verify the claims, no matter how improbable, of a prominent and responsible source like Morrow, and that as a result its failure to conduct any investigation whatsoever of Morrow's highly improbable claims does not establish that it acted with actual malice in republishing Morrow's accusation against Khawar. We are not persuaded.

The jury's special verdict stating that the Globe article was a neutral and accurate report of the Morrow book was merely advisory and is contradicted by both the trial court's finding to the contrary, and, insofar as the advisory special verdict implies that Morrow was a trustworthy source upon whom Globe could justifiably rely, by the jury's special verdict finding that Globe acted with actual malice in republishing Morrow's accusation against Khawar. Moreover, we find in the record no substantial evidence that either Blackburn or Globe's editors were aware of facts about Morrow that would justify unquestioning reliance on Morrow's highly improbable accusations. Globe had no prior experience with Morrow on which it could form a judgment that Morrow was a person who was likely to provide reliable information on matters such as the Kennedy assassination. Morrow did not hold high public office or a position of great social responsibility, nor is there evidence that Morrow's reputation in the scientific, academic, or journalistic community qualified him as a credible and reliable commentator on public affairs.

To support its claim that Morrow was a reliable source, Globe relies primarily on the trial testimony of Ulric Shannon. Called as a witness by Khawar, Shannon testified that he was a resident of Montreal, Canada, that he was then 19 years of age, and that he had graduated from high school and would soon be attending a university in the Montreal area. Shannon said he had been studying the assassination of President John F. Kennedy "for about five years," had read "at least 100 books on the assassination," had "interviewed authors and experts," and had written articles on this subject that had been published by the New York State University and the Montreal Gazette. He had read the Morrow book and two other books Morrow had written. Based on his own attempts

to verify certain of Morrow's claims, on conversations with other researchers, and on his own interview of Morrow in 1993, he had formed the opinion that Morrow was not a credible author or source and that all three of Morrow's books contain "a great number of factual errors."

Globe does not, of course, rely on this particular testimony. Rather, it relies on Shannon's testimony on cross-examination, in which he admitted having written an article in 1993 in which he said (with, as he remarked, "some bewilderment") that "Morrow's place in the [President Kennedy] assassination controversy has not been seriously challenged over the last 18 years," that Morrow "had gained the respect of . . . otherwise solid researchers," and that the reason for this might be that "his scenario of the [President Kennedy] assassination falls well within mainstream theorizing."

On redirect, Shannon restated his own opinion that Morrow's writings on the assassination of President Kennedy should be regarded as fiction, adding that this view was shared by "the majority of the researchers in the assassination community."

Globe's attempt to draw support from carefully selected portions of Shannon's testimony is unjustified. Fairly summarized, Shannon's opinion was that, with a few exceptions, serious researchers in the assassination research community did *not* regard Morrow as a reliable source.[6] The trial record contains no evidence that Globe's editors were aware of or relied upon the opinion of any particular researcher within that community. Thus, we conclude that

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[6] During a hearing outside the jury's presence, Shannon had characterized Morrow's reputation in the assassination research community, which included history professors and journalists, as "abysmal."

Morrow's reputation for credibility within journalistic or academic circles, such as it may have been, provides no justification for Globe's failure to make any effort to verify the truth of the Morrow book's inherently incredible accusation against Khawar.

Having independently reviewed the record, we agree with the Court of Appeal that the evidence at trial strongly supports an inference that Globe purposefully avoided the truth and published the Globe article despite serious doubts regarding the truth of the accusation against Khawar. In short, we conclude that clear and convincing evidence supports the jury's finding that in republishing the Morrow book's false accusation against Khawar, Globe acted with actual malice—that is, with reckless disregard of whether the accusation was false or not.

B. Negligence

Globe's challenge to the sufficiency of the evidence to support the finding of negligence merits little consideration.

Because actual malice is a higher fault standard than negligence, a finding of actual malice generally includes a finding of negligence, and evidence that is sufficient to support a finding of actual malice is usually, and perhaps invariably, sufficient also to support a finding of negligence. In any event, we are satisfied that the evidence we previously reviewed, and which we have concluded clearly and convincingly establishes actual malice in the form of reckless disregard, is sufficient also to sustain the finding of negligence.

In arguing that the evidence does not support a finding of negligence, Globe relies upon the jury's advisory finding (rejected by the trial court) that the Globe article was a neutral and accurate report of the Morrow book. In so arguing, Globe asserts, in essence, that it cannot be negli-

gence to republish a defamatory accusation neutrally and accurately, whether or not the republisher knows or strongly suspects that the accusation is false. Globe's argument is thus a variation on its claim to be protected by a neutral reportage privilege. We have rejected that claim and find it no more persuasive in the context of a challenge to the finding of negligence.

C. Original Libel

In rejecting the jury's advisory finding that the Globe article was a neutral and accurate report of the Morrow book, the trial court noted that although the book and the article both used the same photograph showing Khawar near Kennedy moments before the assassination, it was possible to identify Khawar from the photograph as it appeared in the Globe article (with Khawar's image enlarged and emphasized by inclusion of an arrow) but impossible to identify Khawar from the photograph as it appeared in the Morrow book (lacking the arrow and generally darker and less distinct). The trial court reasoned that because Khawar was not identified by name in the Morrow book and could not be identified by any of the photographs in the Morrow book, his theory of liability against Morrow was fatally defective. Accordingly, the trial court vacated Morrow's default and entered judgment in his favor.

Globe contends that by these actions the trial court unfairly injected an original libel theory into a trial that had been litigated on the assumption that Globe's liability was predicated solely on republication of a defamatory falsehood that appeared in the Morrow book.

The Court of Appeal rejected this argument in a footnote, stating that "the issue of whether the [Globe] article was a neutral and accurate report [of the Morrow book]

is irrelevant on this appeal because of our holding . . . that Khawar was a private figure and that in California there is no neutral reportage privilege applicable to private figures."

Globe renews its contention in this court but appears to concede that it becomes relevant only if we were to hold that a neutral and accurate report of the Morrow book would be protected by the neutral reportage privilege. Because we have held, to the contrary, that this state does not recognize a neutral reportage privilege for the republication of defamatory falsehoods about private figures like Khawar, we need not further address this claim.

V. DISPOSITION

The judgment of the Court of Appeal is affirmed.

KENNARD, J.

WE CONCUR:

GEORGE, C.J.
MOSK, J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.
BROWN, J.

APPENDIX B

[Filed December 22, 1998]

Second Appellate District, Division Seven, No. B084899
S054868

IN THE SUPREME COURT
OF CALIFORNIA

KHALID KHAWAR,
Respondent

v.

GLOBE INTERNATIONAL INCORPORATED,
Appellant

Petition for rehearing DENIED.

Opinion modified.

(2)

Supreme Court, U.S.
FILED
MAR 17 1999

No. 98-1491

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GLOBE INTERNATIONAL, INC.,
Petitioner,
v.
KHALID KHAWAR,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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[Filed Jun 5 1996]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

No. B084899

(Super. Ct. No. WEC139685
Consolidated with SC003094)

KHALID KHAWAR,
Plaintiff and Respondent,

v.

GLOBE INTERNATIONAL, INC.,
Defendant and Appellant,

and

ALI AHMAD aka ALI AHMAND,
Plaintiff and Cross-Appellant,

v.

GLOBE INTERNATIONAL, INC.,
Defendant and Cross-Respondent.

Appeal from a judgment of the Superior Court of Los Angeles County. Richard G. Harris, Judge Presiding. Affirmed.

FACTS AND PROCEEDINGS BELOW

In the April 4, 1989 issue of its tabloid *The Globe,* defendant Globe International, Inc. ("Globe") published an article headlined "*Former CIA agent claims*: IRANIANS KILLED BOBBY KENNEDY FOR THE MAFIA." The article was the subject of the following reference on the front page of the issue: "Iranian secret police killed Bobby Kennedy." The article was written by John Blackburn, a reporter who had worked for Globe as an employee and a free-lance reporter for nearly five years. The article reported on a previously published book entitled *The Senator Must Die: The Murder of Robert F. Kennedy*, written by Robert Morrow and published in November 1988 by Roundtable Publishing. Robert Morrow is a conspiracy theorist who has also written a book about the assassination of John F. Kennedy entitled *Betrayal,* published in 1976. As background for the article, Blackburn allegedly read Morrow's entire book and conducted an in-depth interview of the author.

The theory set forth by Morrow in *The Senator Must Die* is that Robert Kennedy was assassinated by the Iranian Secret Police working in conjunction with the Mafia, and that the true assassin was not Sirhan Sirhan, but a man who called himself Ali Ahmand. The book contained four photographs which appeared beneath the caption, "Photographs of Ali Ahmand." These photos depicted Plaintiff Khalid Iqbal Khawar standing on the podium near Robert Kennedy on the night of the assassination in June of 1968 at the Ambassador Hotel in Los Angeles. Plaintiff Ali Ahmad is in fact the father of respondent Khawar.

In 1968, Khawar, who at the time was a citizen of Pakistan, obtained a position as a free-lance photojournalist for a Pakistani periodical during the presidential elec

tion campaign of 1968. On the night of the assassination Khawar was photographed on the podium near Senator Kennedy, but he never actually entered the pantry area of the hotel where the fatal shots were fired. After the assassination, Khawar was involved in the investigations of the Los Angeles Police Department and the Federal Bureau of Investigation as one of many participants in the campaign event. A few authors have posed questions as to Khawar's activities on June 4, 1968, including Morrow as well as Robert Blair Kaiser in his book *RFK Must Die,* published in 1970. Nevertheless, no official questions have ever been raised concerning Khawar's activities during any phase of his work on the campaign.

The April 1989 article in *The Globe* was accompanied by a photo of Khawar which had previously been published in Morrow's book. Globe added an arrow which pointed to Khawar. Following its publication Khawar received a telephone call from one of his ex-employees, informing him of the story. He received calls regarding the article from places as distant as New Jersey and Bangkok. He and his children received death threats. His house was vandalized, as was his son's car.

On August 31, 1989, Khawar filed suit against Globe, Roundtable and Morrow, alleging that the Globe article and Morrow's book had defamed him. Ahmad filed a defamation suit against the same defendants on November 29, 1989. On September 16, 1991, the two actions were consolidated.

Before trial, both Khawar and Ahmad settled with Roundtable and a Morrow's default was entered. Khawar and Ahmad sought a judgment against Morrow for two million dollars. A jury trial ensued on the claims of Khawar and Ahmad against Globe. However, pursuant to the trial

court's power as specified in Code of Civil Procedure Section 592, on two issues the jury's verdict was to be advisory only: (1) Whether Khawar was a public or a private figure, and (2) whether Globe's article was a "neutral report" concerning Morrow's book. At the end of the plaintiffs' case on March 17, 1994, the trial court granted Globe's motion for a nonsuit with respect to Ahmad on the ground that the Globe article was not "of and concerning" Ahmad.

At the conclusion of the trial, the jury found that: (1) The article was a neutral and accurate report of the statements made by Morrow in his book; (2) Khawar was a private figure; (3) Globe published its article negligently and either knowing that the defamatory statements were false or with reckless disregard of whether the defamatory statements were true or false; and (4) Globe published the article with malice or oppression. The jury assessed damages in favor of Khawar against Globe as follows: $100,000 for harm to Khawar's reputation; $400,000 for emotional distress; and $175,000 in presumed damages. Following a separate punitive damage phase, the jury awarded an additional $500,000 in punitive damages.

The trial judge disagreed with the jury's finding that the article was a neutral and accurate report but allowed the jury's finding that Khawar was a private figure to stand. A judgment in favor of Khawar and against Globe for $1,175,000 as found by the jury was entered on April 15, 1994.[1]

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[1] The trial judge found that the photograph of Khawar that appeared in the Globe constituted the original libel because that photograph (even though it purported to be from the same negative as one in the book) was clear enough to enable Khawar to be identified from it whereas it was impossible to identify Khawar from the much darker and less clear photographs in Morrow's book. Based upon that finding, the trial judge vacated the default of Morrow and

Globe filed a timely notice of appeal from the April 15, 1994 judgment in favor of Khawar. Ahmad filed a notice of appeal from the April 15, 1994 judgment also, but that judgment contained no provisions concerning Ahmad. (While a minute order noting the granting of Globe's motion for directed verdict against Ahmad was created when that motion was granted on March 17, 1994, the impact of the granting of that motion was not embodied in any judgment entered prior to the filing of Ahmad's notice of appeal.) On April 3, 1996, the April 15, 1994 judgment was amended nunc pro tunc as of April 15, 1994 to add: "Plaintiff Ali Ahmad shall have and recover nothing from defendant Globe International, Inc." —thereby curing the defect in Ahmad's notice of appeal.

Globe contends that this Court should reverse the judgment below for the following reasons: (1) Khawar should be classified as a public figure, thereby allowing the Globe article to be privileged under the doctrine of neutral reportage; (2) The trial court exceeded its authority by disregarding the jury's finding of a neutral and accurate report; (3) There was no evidence to support a finding that Globe published its article with malice or reckless disre-

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judgment was ultimately entered in Morrow's favor. Neither Plaintiff has appealed from the judgment insofar as it exculpates Morrow.

Globe urges that the trial judge's finding that the photograph in the Globe article was materially different from its counterpart in the Morrow book could not be used to support the trial judge's finding that the article was not a neutral and accurate report of Morrow's book because the material difference between the two photographs had not been pleaded or argued during the trial. Entirely apart from the fact that there were many other items of evidence that supported a finding that the article was not a neutral and accurate report of the book, the issue of whether the article was a neutral and accurate report is irrelevant on this appeal because of our holding in Points II and III, *infra*, that Khawar was a private figure and that in California there is no neutral reportage privilege applicable to private figures.

gard; (4) Even if Khawar is labeled a private figure, the jury's finding of a neutral and accurate report precludes a finding of negligence; (5) Permitting the so-called scientific testimony of Gavin De Becker constituted reversible error; and (6) The submission of numerous jury instructions left the jury without proper guidance and completely confused. After an independent examination of the entire record, we find no merit in any of these contentions and consequently affirm the judgment as against Globe.

The only contention asserted by Ahmad on appeal is that the trial court's granting of Globe's motion for a nonsuit on the ground that the article was not "of and concerning" Ahmad was improper. Again, following our independent examination of the entire record, we reject Ahmad's contention and affirm the judgment as against Ahmad.

DISCUSSION

I. ONE WHO REPEATS OR REPUBLISHES A DEFAMATORY STATEMENT IS ORDINARILY AS LIABLE THEREFOR AS THE ORIGINAL PUBLISHER.

It is truly hornbook law that "[with an exception not here relevant,] one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." (Rest. Torts 2d, Section 578.) California has recognized this principle for exactly 100 years:

> "If A. says B. is a thief, and C. publishes the statement that A. said B. was a thief, in a certain sense this would be the truth, but not in the sense that the law means. It would be no defense to C., for it would be but a repetition by him of a slanderous charge. His defense must consist in showing that in fact B. was a thief." (*Gilman v. McClatchy* (1896) 111 Cal. 606, 612. Accord, *e.g., Cianci v. New*

Times Publishing Co. (2d Cir. 1980) 639 F.2d 54, 60-61; and authorities from other jurisdictions collected there.)

There are a number of statutory exceptions to this general principle, but none applies to the fact situation presented by the case at bar. (See, *e.g.*, Civ. Code §§ 43.8, 47, 48.5, 48.7, 48.9.) However, Globe asserts that a privilege created by case law, called the "neutral reportage privilege," immunizes it against liability here. We shall consider the extent (if at all) to which that privilege exists in California in Point III, *infra*, after considering a preliminary question in Point II.

II. THE TRIAL COURT'S FINDING THAT RESPONDENT KHAWAR WAS A PRIVATE FIGURE IS SUPPORTED BY THE EVIDENCE AND THE LAW.

The question of whether a plaintiff is a public or private figure is to be determined by the court, not the jury. (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal. Rptr.2d 740].) A trial court's decision on this issue is a mixed question of law and fact. The trial judge must examine the underlying facts and upon that basis conclude, as a matter of law, whether or not a plaintiff is a public figure. When an appellate court is called upon to review the trial court's decision in this regard, the appropriate standard of review is whether, after an independent review of the entire record, substantial evidence supports the trial court's decision. (*Weingarten* v. *Block* (1980) 102 Cal. App.3d 129, 134-35, 142-43 [162 Cal. Rptr. 701], *cert. denied,* 449 U.S. 899, 101 S.Ct 267 (1980).)

An individual may become a public figure in several ways. One way is to be classified as a general public

figure, namely, a person who has achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts. (*Mosesian* v. *McClatchy Newspapers* (1991) 233 Cal. App.3d 1685, 1689 [285 Cal. Rptr. 430], *cert. denied,* 504 U.S. 912, 112 S.Ct. 1946, 118 L.Ed.2d 551 (1992); *Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 351 [41 L.Ed.2d 789, 812, 94 S.Ct. 2997, 3008].) Another way is to become a limited-purpose public figure. These are people who have either voluntarily injected themselves into a particular public controversy, or who have been drawn into such a controversy. The former are termed voluntary limited-purpose public figures; the latter are termed involuntary limited-purpose public figures. These people become public figures regarding the particular issue or controversy with which they are associated. (*Ibid.*)

Globe contends that respondent Khawar is an involuntary limited-purpose public figure because of his proximity to the events which occurred the night of the assassination of Robert Kennedy. Additionally, Globe asserts that Khawar's appearance on a television program after publication of the Globe article supports his classification as a public figure. We hold that the trial judge's decision that Khawar was a private figure is supported by substantial evidence and by the law.

In *Brown* v. *Kelly Broadcasting* (1989) 48 Cal.3d 711 [257 Cal. Rptr. 708, 711 P.2d 406], the California Supreme Court held that a publication or broadcast by a member of the news media to the general public regarding a private person is not privileged under Civil Code section 47, subdivision (c)[2] regardless of whether the communication concerns a matter of public interest. The

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[2] At the time when Brown was decided, subdivision (c) of Section 47 was numbered subdivision 3.

defendant argued that the plaintiff was a public figure and would consequently have to prove malice on the part of the defendant in order to recover for the alleged defamation. In its discussion, the California Supreme Court addressed the boundaries of the limited-purpose public figure classification.[3] It held that a person is not a public figure merely because he or she happens to be involved in a controversy that is newsworthy. (Accord, *Time, Inc.* v. *Firestone* (1976) 424 U.S. 448, 452-55 [47 L.Ed.2d 154, 161-64, 96 S.Ct. 958]). In order to be classified as a limited-purpose public figure, an individual must have undertaken some voluntary act through which he or she seeks to influence the resolution of the public issue involved. Furthermore, when called upon to make a determination of limited-purpose public figure status, courts should look for evidence of affirmative actions by which the individual has thrust himself or herself into the forefront of a particular public controversy. (*Reader's Digest Ass'n* v. *Superior Court* (1984) 37 Cal.3d 244, 254-55 [208 Cal.Rptr. 137, 690 P.2d 610]; *Vegod Corp.* v. *American Broadcasting Companies, Inc.* (1979) 25 Cal.3d 763, 768-69 [160 Cal.Rptr. 97, 603 P.2d 14], *cert. denied,* 449 U.S. 886, 101 S.Ct. 242 (1980).) In the case at bar, the trial court held that Khawar's appearance on the podium in the ballroom did not make him an involuntary public figure within the context of the assassination which actually occurred in the pantry, an area Khawar never entered. This court concurs in that analysis. Khawar's affirmative actions, namely, attendance at

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[3] Although the *Brown* case involved the issue of the applicability of the Civil Code Section 47(3) privilege to a private person rather than the issue of the applicability of the "neutral reportage" doctrine to a private person, the policy factors involved in both issues are substantially the same; and we therefore find cases involving the Section 47(3) privilege highly persuasive on the issue before us.

the Kennedy campaign rally and appearance on the podium near Senator Kennedy, do not rise to the level of action by which the purported public figure *thrust himself into the forefront of a public controversy*. Khawar undertook no voluntary act which sought to *influence the resolution of a public issue*.

The United States Supreme Court stated in *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 352, that a court must focus on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." As discussed within the context of the *Brown* holding, Khawar's action of appearing on the podium at the rally is not sufficient in nature and extent to suggest that Khawar undertook voluntary action which elevated his status to the level of a public figure. The United States Supreme Court also held in *Wolston* v. *Reader's Digest Ass'n., Inc.,* (1979) 443 U.S. 157, 167, 99 S.Ct. at 2675, 2707, 61 L.Ed.2d at 460, that "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." As such, Khawar's involvement as one of many participants in the events leading up to the assassination does not automatically classify him as a public figure. Additionally, as Justice Blackmun stated in his concurring opinion in *Wolston*, the passage of time often will be relevant in deciding whether a person possesses the characteristics of a public figure. (443 U.S. at 170. See also *Briscoe* v. *Reader's Digest Ass'n, Inc.* (1971) 4 Cal.3d 529, 537-540.) The trial court followed this line of reasoning when it stated that the lapse of twenty years since the Robert Kennedy assassination was sufficient to reduce any arguable public figure status of Khawar to that of a private figure.

Khawar did give an interview in 1989 to television station KERO in Bakersfield in order to rebut the charges

made by Globe.[4] Khawar was privileged to conduct this interview in order to protect his own interests without sacrificing his status as a private figure. The Fourth Circuit held in *Foretich* v. *Capital Cities/ABC, Inc.* (4th Cir. 1994) 37 F.3d 1541, 1558, that "A person who has been publicly accused of committing an act of serious sexual misconduct that would be punishable by imprisonment cannot be deemed a 'limited-purpose public figure' merely because he or she makes reasonable public replies to those accusations." The court reasoned that it did not want to "attribute public figure status to otherwise private persons merely because they had responded to such accusations in a reasonable attempt to vindicate their reputations." Having been accused of assassinating Robert Kennedy in the Globe article, a crime which would certainly be punishable by imprisonment and generate public outrage, Khawar's interview with the local television station in Bakersfield was an attempt to vindicate his reputation. His status as a private figure was not raised to the level of a limited-purpose public figure merely because of his involvement with the media in this one interview. (See also *Time, Inc.* v. *Firestone, supra,* 424 U.S. at 455 fn. 3.)

In *Denney* v. *Lawrence,* (1994) 22 Cal.App.4th 927 [27 Cal.Rptr.2d 556], the Court of Appeal held that the plaintiff was a limited-purpose public figure because he had voluntarily involved himself in the controversy surrounding his brother's arrest, conviction, and sentencing. Plaintiff had given press interviews which promoted his

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4 Globe asserts, without citation to the record before us, that Khawar made other post-publication appearances and gave other post-publication interviews. We have found nothing in the record demonstrating that evidence of such other activities on the part of Khawar was presented to the trial court, and so we ignore those assertions. (See California Rules of Court, Rule 13(a) ["The statement of any matter in the record shall be supported by appropriate reference to the record."].)

version of the case and had attempted to influence public opinion as to the circumstances surrounding his brother's case. The court's holding in *Denney* is instructive in an analysis of the action taken by Khawar. Khawar merely rebutted the charges made against him in the Globe article in a lone interview on a Bakersfield television station. He did not attempt to influence public debate or become involved in the controversy surrounding the assassination of Robert Kennedy. His only involvement was to rebut the actual libel. Because he did not involve himself in the public debate of the underlying issue—the assassination of Robert Kennedy—he is properly distinguished from the plaintiff in *Denney* whose actions elevated his status to a limited-purpose public figure. Under the analysis in *Denney*, Khawar's actions do not raise him above the status of a private figure.

In sum, the evidence and the law justify the trial judge's finding that Respondent Khawar was a private figure, not a limited-purpose public figure. He undertook no voluntary action which brought him into the center of public controversy, and he took no part in any attempt to shape opinion on the resolution of a public issue.

III. CALIFORNIA HAS NOT ADOPTED THE NEUTRAL REPORTAGE PRIVILEGE WITH RESPECT TO PRIVATE FIGURES

In 1977 a privilege, which has become known as the "neutral reportage privilege," was created by the Second Circuit in *Edwards* v. *National Audubon Society, Inc.* (2d Cir. 1977) 556 F.2d 113, *cert. denied,* 434 U.S. 1002. That privilege protects against an action for defamation the accurate and disinterested reporting of charges by others that are themselves newsworthy. In other words, it protects the accurate and disinterested reporting of

charges made by others that are of public interest because they were uttered and not necessarily because of what they say. In order to qualify for the protection afforded by this privilege, the existence of four essential elements must be demonstrated: (1) the charges must be newsworthy charges that create or are associated with a public controversy; (2) the charges must be made by a responsible and prominent souurce; [5] (3) the charges must be reported neutrally and accurately; and (4) the charges must be about a *public official or public figure.*

The "neutral reportage privilege" has been adopted in some jurisdictions and rejected in others.[6] We are aware

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5 This requirement may have been substantially diluted over the years since *Edwards* was decided. See *Barry v. Time, Inc.* (N.D. Cal. 1984) 584 F. Supp. 1110, 1125-1127.

6 Adopting jurisdictions include Ohio (*April v. Reflector-Herald, Inc.* (1988) 46 Ohio App.3d 95, 546 N.E.2d 466). (Appellate decisions in official reports in the Eighth Circuit [*Price v. Viking Penguin, Inc.* (8th Cir. 1989) 881 F.2d 1426, *cert. denied*, 493 U.S. 1036 (1990)] and Florida [*Huszar v. Gross* (Fla. Ct. App. 1985) 468 So.2d 512] adopt a neutral reporting privilege but are referring to one protecting neutral reporting of official proceedings rather than of charges made by a private figure not before a public body and not to a public official.)

Rejecting jurisdictions include the Third Circuit (*Dickey v. CBS, Inc.* (3d Cir. 1978) 583 F.2d 1221; but see *Medico v. Time, Inc.* (3d Cir. 1981) 643 F.2d 134, 145, *cert. denied*, 454 U.S. 836, 102 S.Ct. 139, 70 L. Ed.2d 116 (1981)); New York (*Hogan v. Herald Co.* (1982) 84 App. Div.2d 470, 446 N.Y.S.2d 836, *aff'd*, 58 N.Y.2d 630, 458 N.Y.S.2d 538, 444 N.E.2d 1002); Kentucky (*McCall v. Courier-Journal & Louisville Times Co.* (Ky. 1991) 623 S.W.2d 882, *cert. denied*, 456 U.S. 975, 102 S.Ct. 2239, 72 L.Ed.2d 849 (1982); and South Dakota (*Janklow v. Viking Press* (S.D. 1985) 378 N.W.2d 875, 881.)

Intermediate Illinois appellate court decisions have split on whether the privilege applies in that state. (*Krauss v. Champaign News Gazette, Inc.* (1978) 59 Ill. App.3d 745, 375 N.E.2d 1362 [privilege adopted]; *Newell v. Field Enterprises, Inc.* (1980) 91 Ill. App.3d 735, 47 Ill. Dec. 429, 415 N.E.2d 434 [privilege rejected];

of no reported state court in California deciding whether the neutral reportage privilege exists in the state.[7] For a reason we are about to discuss, we will not reach the question of whether the neutral reportage privilege exists in California.

Tunney v. American Broadcasting Co. (1982) 109 Ill. App.3d 769, 777-778, 441 N.E.2d 86, 92 (1982) [privilege rejected].) The Illinois Supreme Court has not resolved the conflict. (See *Catalano v. Pechous* (1980) 83 Ill.2d 146, 170, 419 N.E.2d 350, 362, *cert. denied*, 451 U.S. 911 (1981).)

Neither the United States Supreme Court nor the Ninth Circuit has adopted or rejected the privilege.

The checkered history of the neutral reportage privilege was traced, and its then current status was discussed, by the prevailing counsel of record in *Edwards*, in Abrams, *The First Amendment in the Second Circuit: Reflections on Edwards v. National Audubon Society, Inc., the Past and the Future*, 65 St. John's L. Rev. 731, 737 (1991) (The privilege "was novel when decided in 1977 and remains unresolved today.")

[7] Globe claims that the neutral reportage privilege has been adopted in three reported California state court cases: *Weingarten v. Block, supra*, 102 Cal. App.3d 129, 148 [162 Cal. Rptr. 701], *cert. denied*, 449 U.S. 899, 101 S. Ct. 267 (1980); *Grillo v. Smith* (1983) 144 Cal. App.3d 868, 872 [193 Cal. Rptr. 414]; and *Stockton Newspapers v. Superior Court* (1988) 206 Cal. App.3d 966, 981-982 [254 Cal. Rptr. 389]. *Amici curiae* make no such claim.

While each of these three cases cites *Edwards*, our examination of them leads us to conclude that they do not support the proposition that California has adopted the neutral reportage privilege. *Weingarten* and *Grillo* merely quote brief passages from *Edwards* as authority for the general proposition that the press may report charges concerning a public figure without automatically assuming responsibility for them; neither case mentions any neutral reportage privilege or sets forth the elements therof. *Stockton Newspapers* involved only the Civil Code Section 47(c) privilege and cited *Edwards* in a footnote for the proposition that "[i]t has been suggested that there is or should be a somewhat analogous doctrine within the federal constitutional privilege"; assuming that the doctrine referred to was the neutral reportage privilege, *Stockton Newspapers* did not adopt that doctrine or in any way indicate that it had been adopted in California.

Globe contends that even if Khawar is classified as a private figure, many courts have held that the neutral reportage privilege set forth in *Edwards* encompasses the right to report an allegation concerning a private figure. As authority for this contention Globe cites *April* v. *Reflector-Herald, Inc.*, (1988) 46 Ohio App. 3d 95, 98, [546 N.E.2d 466]. While this case may be persuasive within its jurisdiction, it is not binding upon this court. An examination of *California* precedent leads us to conclude that in this state there is no neutral reportage privilege applicable to situations involving private figures.

To begin with, there are two reported United States District Court cases in point: *Barry* v. *Time, Inc.* (N.D. Cal. 1984) 584 F.Supp. 1110, 1127, stated that "[t]he neutral reportage privilege . . . is not without limitations. It cannot be used as an absolute privilege to republish defamatory statements about purely private persons not already caught up in a public controversy. The privilege applies whether the defamed person is a *public figure,* whether general or limited, who is involved in an existing controversy." (Emphasis added.)[8] Next, in *Crane* v. *Arizona Republic* (C.D. Cal. 1989) 729 F. Supp. 698, 710-711, the District Judge noted the existence of the neutral reportage doctrine and its application in the *Barry* case to a public figure. However, the District Judge then stated:

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[8] The definitiveness of *Barry*'s holding on the issue before us is uncertain. Shortly after making the above-quoted statement in no uncertain terms, in a footnote the *Barry* court indicated that "[s]ince this court finds that Barry is a public figure, it is unnecessary to resolve this difficult question [whether the neutral reporting privilege applies to private figures] at the present time." (584 F. Supp. 1127 fn. 20.)

In reliance on the decision in *Barry, Ward v. News Group International Ltd.* (C.D. Cal. 1990) 733 F. Supp. 83, held the doctrine of neutral reportage applicable to a public figure.

> "The Court of Appeals for the Ninth Circuit has neither adopted nor rejected this doctrine. Only the Court of Appeals for the Second Circuit in Edwards v. National Audubon Society, 556 F.2d 113, 1125 (2d Cir. 1977), and a handful of district courts have adopted the doctrine. Many courts have rejected the doctrine. See Note, The Developing Privilege of Neutral Reportage, 69 Va.L.Rev. 853, 863-65 (1983) (collecting cases). This court need not adopt or reject this doctrine in rendering its decision . . . as the facts of this case [including the fact that one of the plaintiffs was not a public figure] render the doctrine inapplicable." (729 F.Supp. at 710.) (Accord, *e.g., Dixson v. Newsweek, Inc.* (10th Cir. 1977) 562 F.2d 626, 631.)[9]

In the face of these persuasive but non-binding District Court cases, Globe and *amici curiae* suggest that policy reasons exist for extending the neutral reportage privilege to private individuals. These policy considerations are best discussed in light of the California Supreme Court's decision in *Brown* v. *Kelly Broadcasting Co., supra*, 48 Cal.3d 711. The court in *Brown* held that a publication or broadcast by a member of the news media to the general public regarding a private person is not privileged under Civil Code section 47, subdivision (c)—the so-called "public interest privilege."[10] The court so held in the face of the defendant's argument that the communication should

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[9] The Ninth Circuit's opinion in the *Crane* case expressly declined to review the District Court's determination concerning the neutral reportage doctrine because neither party contested that determination on appeal. (*Crane v. Arizona Republic* (9th Cir. 1992) 972 F.2d 1511, 1525.)

[10] Again, we find cases involving Section 47(c) highly persuasive on the issue before us. See footnote 3, *supra*.

be privileged as a matter of public interest. The policy reasons asserted by Globe and *amici* in this case as well as those asserted by the defendant in *Brown* center around one theme, namely, an assertion that the privilege in question is a necessary aspect of the First Amendment's protection for news reporting. The *Brown* court examined the balance between the First Amendment's protection of news reporting and the protection of a private individual's reputation. Quoting a Florida District Court of Appeals case, this balance was discussed as follows:

> "The defamation action, properly limited, plays an important role in a free society as it represents the individual's sole remedy against the occasional excesses of the print and electronic media which often have vast resources to inflict untoward damage upon an individual. Surely, a decent, open society cannot, in the name of press and speech freedom, so thoroughly undermine this remedy as to render it useless to those people who have been damaged by a defamatory falsehood negligently uttered in the mass media and have not in any way sought the public limelight. . . . It therefore seems neither sensible nor fair to push the parameters of free press and free speech to such an extent . . . that we needlessly plow under other important individual rights." (48 Cal.3d at 743, quoting *Miami Herald Pub. Co. v. Ane* (Fla. App.1982) 423 So.2d 376, 387.)

In other words, the *Brown* court's examination of these competing interests yielded the result that news media must not be privileged to report in a way which may unreasonably undermine individual rights because "a reasonable degree of protection for a private individual's reputation is essential to our system of ordered liberty." (*Brown v. Kelly Broadcasting, supra,* 48 Cal.3d at 743).

This court holds that in California there is no neutral reportage privilege extending to reports regarding private figures. We do not reach the question of whether the privilege exists at all in California because even if it does exist, it does not apply to Khawar—a private figure.

Accordingly, because the privilege, even if it exists in California, would be inapplicable to the case at bar, any further discussion of whether the elements of the privilege are satisfied with regard to the Globe article is irrelevant. In particular, the court's finding that the neutral reportage privilege is inapplicable in this case forecloses another issue raised by Globe on appeal: Appellant contends that the trial court exceeded its authority by disregarding the jury's finding that the Globe article was a neutral and accurate report. We find it unnecessary to reach this issue; whether the Globe article was a neutral and accurate report of the charges in Morrow's book is irrelevant in light of our holding that in California any neutral reportage privilege does not apply to private figures such as Khawar.

IV. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S FINDINGS THAT GLOBE PUBLISHED ITS ARTICLE WITH MALICE AND EITHER KNOWING THE DEFAMATORY STATEMENTS WERE FALSE OR WITH RECKLESS DISREGARD OF WHETHER THEY WERE TRUE OR FALSE.

If Khawar were a public figure, the judgment in his favor could not stand unless the record supported the jury's finding that Globe acted with malice and either knowing the defamatory statements were false or with reckless disregard of whether they were true or false. (*New York Times v. Sullivan* (1964) 376 U.S. 254.) Because Khawar was a private figure, he was not required to

prove malice or reckless disregard in order to recover compensatory damages. (*E.g., Franklin v. Benevolent and Protective Order of Elks, Lodge No. 1108* (1979) 97 Cal. App.3d 915.) However, even as a private figure, the punitive damage award in his favor cannot stand unless the record supported the jury's finding that Globe acted with malice or oppression. Actual malice (and reckless disregard, for that matter) are concepts which are difficult to define with precision. The meanings assigned to these terms cannot readily be captured in one infallible definition. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 730 [20 L.Ed.2d 262, 88 S.Ct. 1323]). Rather, only through a case-by-case analysis can a court give content to these otherwise elusive standards. (*Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 686 [105 L.Ed.2d 562, 109 S.Ct. 2678]).

In its consideration of these standards, the Court of Appeal in *Antonovich v. Superior Court* (1991) 234 Cal. App.3d 1041, 1048 [285 Cal.Rptr.863], stated: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." The court goes on to assert that a failure to investigate will not on its own support a finding of actual malice. However, it concludes that "the purposeful avoidance of the truth is in a different category. Inaction, i.e., failure to investigate, which was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of charges will support a finding of actual malice." (*Ibid.*) In short, purposeful avoidance of the truth will support the finding that the defendant entertained serious doubts as to the truth of its publication, and this finding will give rise to the conclusion

that there was reckless disregard for truth or falsity and actual malice.

There are several facts in this case which support the finding that Globe published its article pursuant to a deliberate decision not to acquire knowledge of facts that might reveal the falsity of the charges. We start with the fact that the article is not merely false but glaringly false —it makes assertions that on the surface seem extraordinarily improbable—a fact that certainly is circumstantial evidence that Globe's representatives had a very high degree of skepticism concerning the truthfulness of the charges. Next, we have the failure by the article's author, John Blackburn, to contact the person called "Ahmand" in Morrow's book. Blackburn testified that he believed he had checked with the Los Angeles directory assistance and was told there was no such person as Ahmad listed. However, his notes reflect no such attempt. Ahmand is in fact listed in the Bakersfield telephone directory and there is a public database available which contains directory assistance listings for the entire country. Furthermore, for minimal cost, a private investigator could have been retained to locate Ahmad. Plaintiff's expert Gavin De Becker was able to locate Khawar by referencing the index of Morrow's book which states that Ahmand is also referred to as Khalid Iqbal. A single call to directory assistance in Los Angeles provided him with the telephone number of an Iqbal relative who informed him that Khalid Iqbal lived in Bakersfield and is also referred to as Khalid Khawar. A single call to the Bakersfield directory assistance provided Khawar's number. Furthermore, the spelling of Ahmad's name as Ahmand still provided De Becker with Ahmad's telephone number.

There are also contradictions in the record regarding Blackburn's efforts to contact other key sources regarding

the assassination of June 4, 1968. When asked whether he had interviewed anyone else regarding the story, specifically three obvious key people connected to the Kennedy campaign or at the Ambassador Hotel on the night of the assassination, Blackburn testified that he was not sure. (1) Rosey Grier, a celebrity and Kennedy security official who was present at the hotel on the night of the assassination, testified he was certain he was not contacted by anyone from Globe. (2) Frank Mankiewicz, press secretary to Robert Kennedy and witness to the actual murder, stated that neither Blackburn nor anyone ~~else~~ at Globe had contacted him in connection with the story. Finally, (3) Colonel L. Fletcher Prouty, Jr., an armed forces officer under the Kennedy administration whose autobiography entitled *The Secret Team* explored the assassination of John F. Kennedy, testified that he did not authorize the foreword attributed to him in Morrow's book and that no one at Globe had contacted him in any capacity.

Blackburn's failure to recall whether he had ever contacted these people in the face of their direct testimony that he had not must be considered in light of the instructions received by the jury, specifically BAJI No. 2.22. Under this instruction, the jury is permitted to reject the entire testimony of a witness who willfully has testified falsely on a material point. (*Nelson* v. *Black* (1954) 43 Cal.2d 612, 613 [275 P.2d 473]). In the case at bar, whether Blackburn contacted obvious sources who would certainly have confirmed the falsity of the story is a material point. The tentative nature of Blackburn's testimony on that point would have justified the jury under BAJI No. 2.22 in rejecting his entire testimony concerning the efforts of Globe to properly investigate the story.

The testimony of three Globe editors who were associated with the story further demonstrates a series of

deliberate decisions not to acquire knowledge of facts which would have confirmed the probable falsity of the charges. Editor Ken Harrell, who approved Blackburn's story proposal, testified that Globe lacked any knowledge or evidence that would lend credibility to Morrow's charges. In light of its pretrial defense that the story was really a book review, Globe claimed that the truth or falsity of the charges was irrelevant. However, Blackburn contradicted this characterization, and Globe eventually stipulated that the article was in fact not a book review but a news story. Editor Rod Gibson, who edited Blackburn's story, testified that Globe did not know whether any of the statements in Morrow's book were true, other than facts on record such as Sirhan Sirhan's arrest for the murder. Finally, managing editor Robert Taylor stated that Globe made no attempt to contact *any* of the twenty-three hundred people who were present on the night of the assassination. He further testified that there was *no need to investigate this kind of story,* yet he had no recollection of a deadline for publication.[11] These statements conflicted with the testimony of John Blackburn that he had in fact made an attempt to investigate Morrow's charges.

In sum, the foregoing evidence strongly suggests that Globe purposefully avoided the truth. Therefore, it was permissible for the jury to conclude that the article was published in the face of serious doubts regarding its truth and credibility. Measured by the standards set forth in *Antonovich, supra,* the foregoing evidence supports the jury's finding that Globe published its article with malice and reckless disregard.

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[11] The need for constitutional protection is much less where more considered editorial judgments are possible than when items are reports of "hot news"——items of possible *immediate* public concern or interest. (*Briscoe v. Readers Digest Assn., Inc., supra,* 4 Cal.3d 529, 535.)

V. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S FINDING THAT GLOBE WAS NEGLIGENT IN THE PUBLICATION OF ITS ARTICLE.

Globe contends that the jury's finding of a neutral and accurate report precludes a finding of negligence. It asserts that the proper question under a negligence standard is whether Globe was indifferent or negligent with respect to the accurate reporting of the charges in Morrow's book. Based upon the jury's finding that the article was a neutral and accurate report, Globe argues that it was improper for the jury to find that Globe was negligent.

In asserting this argument, Globe confuses two separate duties. One is a publisher's duty to neutrally and accurately report the information contained in a source of an article, in this case, Morrow's book. Separate is a publisher's general duty to report the truth. It is the second duty on which the jury presumably focused in determining that Globe acted negligently in the dissemination of the facts surrounding the content of the article. It is this duty to which we now devote attention.

Several experts testified at trial that Globe's conduct fell below the acceptable standard of care for journalism. Two sources were presented at trial as reflective of this standard of care. The first was the Society of Professional Journalists' Code of Ethics. Article IV of the Code deals with accuracy and objectivity, stating: "Truth is our ultimate goal. . . . Photographs and telecasts should give an accurate picture of an event and not highlight an incident out of context." Article V on fair play specifically addresses the protection of individual reputations, stating: "The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply." This

standard is also reflected in the second source, Article VI of the American Society of Newspaper Editors' Statement of Principles: "Journalists should respect the rights of people involved in the news, observe the common standards of decency, and stand accountable to the public for the fairness and accuracy of their news reports. . . . Persons publicly accused should be given the earliest opportunity to respond."

In applying these standards to Globe's conduct in this case, we are assisted by the evidence reviewed in Point IV, *supra,* addressing Globe's malice and reckless disregard for the truth in reporting this story. The substantial evidence that Globe failed to contact Ahmad or any other key sources as well as its admitted indifference to the truth or falsity of the story strongly supports the jury's finding that Globe was negligent in failing to learn whether the charges were in fact false before publishing its article.

VI. ANY ERROR IN RECEIVING TESTIMONY FROM DE BECKER WAS EITHER NOT TIMELY ASSERTED BEFORE THE TRIAL COURT OR INVITED, AND SUCH ERROR CANNOT SUPPORT A REVERSAL.

Globe challenges the trial court's decision to allow Gavin De Becker to testify. De Becker conducts a business of providing advice and services designed to protect its clients against terrorists, assassins and others seeking to inflict bodily injury or harass. He was called by Khawar as an expert and testified as to the likelihood that Khawar was placed at risk of bodily harm by the Globe article. Globe contends that the trial court erred in failing to apply a *Kelly/Frye* standard to the testimony of De Becker. That standard requires that before evidence of a new scientific technique is admissible, the general ac-

ceptance of the new technique in the relevant scientific community must be established. (*People* v. *Kelly* (1976) 17 Cal.3d 24 [130 Cal.Rptr. 144, 549 P.2d 1240]; *Frye* v. *United States* (D.C. Cir. 1923) 293 F. 1013.)

With one exception, the testimony of De Becker was not of the sort to be measured by *Kelly/Frye*. With that one exception. De Becker merely expressed his opinion, based upon his familiarity with terrorist and other criminal activity involving bodily harm or the risk of bodily harm and based upon his years of experience in evaluating risk of bodily harm in the course of his business activities. The *Kelly/Frye* standard applies to new scientific techniques and tests and does not apply to expressions of expert opinion that are not based upon such a technique or test. (*E.g., People* v. *Mendibles* (1988) 199 Cal.App. 3d 1277, 1294-1295 [245 Cal.Rptr. 533]; *People* v. *Cegers* (1992) 7 Cal.App.4th 988, 997-999 [9 Cal.Rptr. 297]; *People* v. *Stoll* (1989) 49 Cal.3d 1136, 1155-1157 [265 Cal.Rptr. 111, 783 P.2d 698].)

However, in a hearing held outside of the presence of the jury pursuant to Evidence Code section 402, De Becker testified that his firm had developed and used a computer program that enabled its representatives to predict a range of probability that a given set of facts will result in an attack on a person. According to De Becker's 402 hearing testimony, the data base for that computer program is comprised of facts from actual past cases. The input of those facts obviously involved a subjective weighting of them. Whether the weighting was appropriate is a subject that obviously can be open to disagreement among experts. The computer result generated through the use of the computer program is precisely the novel sort of test result that can be testified to in the presence of the trier of fact only if the requirements of the *Kelly/*

Frye rule have been met. When stating opinions based upon the use of self-prepared computer programs, a witness obviously is speaking as a "scientist" for purpose of the *Kelly/Frye* rule. The showing before the trial court was insufficient under *Kelly/Frye*. There was no evidence whatsoever that the computer program or the weighting of factors inherent in it were generally accepted as accurate and reliable by the scientific community of experts in the science of risk evaluation.

Nevertheless, for two reasons Globe's challenge of the judgment below on *Kelly/Frye* grounds is not persuasive: (1) There was almost no testimony by De Becker *in the presence of the jury* concerning the computer results; (2) What testimony the jury did hear concerning the computer results was either (a) received without objection or motion to strike on the part of Globe or (b) elicited by questioning by Globe's own counsel.

In the presence of the jury and over objection by Globe's counsel, De Becker was asked how he would advise and assess the risk to a client in Khawar's position. Before he began his answer, the question was modified by the following incomprehensible addition, to which no objection was asserted:

> "And including that if you would, Mr. De Becker, the basis, based on your analysis and techniques for whether that person would have reasonable basis for their fears about the security for themselves and their family."

What followed was a lengthy enumeration and description by De Becker of various factors he would take into account in evaluating the risk to such a person, without any mention of a computer program.

Then the following question, also somewhat incomprehensible, was asked *and no objection to it was asserted*:

> "Let's talk about the criteria you use in this Mosaic software program that's used to advise the U.S. Supreme Court Justices and the senators and the congressmen and people like that. Are these criteria the criteria that you factor into your threat assessment analysis and the software that you have provided and the government has contracted for various agencies?"

De Becker's answer was "yes."

The next question that De Becker responded to was the following, again largely incomprehensible and *again without objection*:

> "Mr. De Becker, can you briefly identify, if you can —you can use the writing tablet there—the criteria that you focused on or felt particularly applicable to this case or criteria that you would normally evaluate in risk assessment for vulnerable people?"

De Becker then began to enumerate and describe various criteria he used. At one point, in describing a criteria he called "experience" dealing with what had happened in similar situations in the past, De Becker stated: "In this case I have extensive experience in cases with similar outcomes." Khawar's attorney then asked:

> "Why don"t you stop there for a second. How many cases has Gavin De Becker, Incorporated [De Becker's firm] handled in terms of risk and safety assessments, approximately?

De Becker replied: "We've evaluated about 15,800 cases." Khawar's attorney then asked the following question, *to which no objection was asserted*: "The data from that is

input on your computer assessment?" De Becker's response was as follows:

> "It is. It is. And what happens is that with each of these that I'm describing now, when you measure these factors the computer compares it to thousands of cases. And in those where the outcome is known, the computer comes back and says that this, that you've written here is most similar to those who attacked or this, that you've written here is most similar to those that didn't attack."

No motion to strike this response was made. De Becker then continued with a long narrative in which he identified and described various other factors. In the midst of that narrative, De Becker stated:

> "Now, specifically in the case of threats that he [the person identified in the Globe article as the murderer of Robert Kennedy] had, we apply this Mosaic [the computer program] model. Now, Mosaic would keep us here for a long time, so I'm not going to go into all the—I'm not going to write down the factors. . . ."

Except for this interjection, *to which no motion to strike was directed,* the next time the computer program was mentioned by De Becker was at the end of his narrative, when the following colloquy occurred:

> *De Becker:* "So now to go back to the very beginning of this long answer when you asked what would we evaluate. We would evaluate the emotional investment, and I see a lot of it. And even in the absence of these threats there's the obvious emotional investment connected to this beloved public figure. Then we would evaluate his accessibility and locateability, and we've done that. We would evaluate these communications, which—I mean, it's mathematical.

But—I'll just tell you that the rating they got is called R-2-High, which is right below the highest category you could get."

Counsel for Khawar: "Well, let me just clarify something."

De Becker: "Surely."

Counsel for Khawar: "This is a ranking for your computer program. This is not any sort of percentage you're going to predict with by a percentage basis that something's going to happpen; is it?"

De Becker: "No. It's not a percentage basis. What it indicates is that this case is most similar to a class of cases that did pursue—encounters. If it was the next rating, the higher rating, then it would mean that this case is most similar to a class of cases that pursued encounters and acted out in a way that is violent, and it's right below that level. And I can see why. There are several factors we just don't know about the people. I mean, if I knew that they just purchased a gun, that would obviously increase the—increase the rating."

No objection was made to any question posed during this colloquy, nor was any of De Becker's testimony during this colloquy met by a motion to strike.[12]

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[12] When De Becker seemed about to continue on with his narrative, Globe's attorney objected on, in substance, the ground that there was no question pending. The trial judge, apparently not hearing the objection or not comprehending it because of its informal phraseology, then asked "[d]id you make an objection?" Globe's attorney replied: "Your Honor, I've objected to the entirety of this witness's testimony." The trial judge then stated: "I understand. I'm making my own objection at this time that we need a question."

In one sense it is true that Globe had objected to the entirety of De Becker's testimony: in the sense that Globe asserted that De

Because there was neither objection or motion to strike asserted by Globe concerning the aforementioned testimony of De Becker, any error in receiving that testimony was waived.[13] (Evid. C. § 353(a); *People* v. *Gates* (1987) 43 Cal.3d 1168, 1185 [240 Cal.Rptr. 666, 743 P.2d 301], *cert. denied*, 486 U.S. 1027, 108 S.Ct. 2005 (1988).)

The only other testimony of De Becker conceivably relevant to the present inquiry occurred under cross-examination by Globe's attorney. Again, Globe made no motion to strike such testimony. Any error in receiving that testimony obviously was invited. (*Zarafontis* v. *Yellow Cab Co.* (1932) 127 Cal. App. 607, 609.)

Accordingly, any error in receiving testimony from De Becker was either not timely asserted before the trial court or invited, and such error cannot support a reversal.

Becker was not qualified to even take the witness stand. That objection on Globe's part was properly overruled. However, in another sense—the one critical to evaluating the statement in question in the context now under discussion, it is not true that Globe had objected to the entirety of De Becker's testimony. Once the Court had rejected Globe's effort to keep De Becker off the witness stand entirely, Globe only asserted selected objections to De Becker's testimony, and none to the passages hereinabove quoted. Under these circumstances, to the extent that the trial judge's "I understand" response can be construed as confirming anything, at most it confirmed the understanding of the trial judge that Globe objected to De Becker even taking the witness stand.

[13] Counsel for Globe neither sought nor obtained the agreement of the trial judge that his objections to De Becker's competence would be deemed continuing objections. Compare *People* v. *Jennings* (1988) 46 Cal.3d 963, 975 fn. 3, *cert. denied*, 489 U.S. 1091, 109 S.Ct. 1559 (1989) (stipulation that trial court's ruling on *in limine* motion to exclude evidence would be binding deemed continuing objection, preserving issue of admissibility of the evidence for appeal).

VII. GLOBE'S CONTENTION THAT THE JURY INSTRUCTIONS WERE INCOHERENT AND INCONSISTENT IS WITHOUT MERIT.

Globe's Opening Brief assigns error as follows:

> ". . . [T]he trial court charged the jury with a melange of inconsistent and conflicting instructions covering virtually every issue ever raised in a defamation case, regardless of its application to the particular case at hand. [Citation to the passage in the Reporter's Transcript in which all of the jury instructions given in the trial are transcribed, other than the instructions given during the second phase in which the amount of punitive damages was fixed.] However, the trial court's charge to the jury gave it no advice or direction as to how these inconsistent and often incoherent instructions were to be applied, interpreted or reconciled."

After leveling this nonspecific broadside at the jury instructions given during phase one of the trial, Globe favors us with only a few particulars for review.

Globe complains that while the jury was given instructions on negligence, recklessness and malice, it was not told how these theories of liability interrelated. As Globe's Opening Brief puts it, "[t]he combination of the numerous inconsistent instructions make it impossible to determine the basis for any of the jury's findings." This contention is entirely without merit. All three theories of liability were defined separately and accurately for the jury. Any failure to explain how the three theories interrelated or otherwise to link the three is irrelevant in that the jury was not asked to render a general verdict or even a general verdict on the subject of liability. Instead, the jury was submitted a special verdict form calling for it to determine separately the existence or non-existence of each one of

these three bases for liability. The task of determining how these three bases for liability interrelated was left for the trial judge to perform.

Globe contends that the jury's findings that Globe acted negligently is inconsistent with the jury's finding that Globe was guilty of intentional misconduct and reckless disregard for the truth. We find nothing inconsistent with those findings. The evidence received at trial is sufficient to support a simultaneous finding that Globe intended to engage in misconduct (see Point IV, *supra*) and that this misconduct on the part of Globe was the doing of something which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do (see Point V, *supra*) and that it was carried out with reckless disregard for the truth (see Point IV, *supra*).

Finally, Globe contends that "the court gave the jury two confusing, incomplete, and contradictory instructions regarding the issue of whether Khawar is a public figure for the purposes of this case." In view of our determination that the public figure issue was one for the trial judge to decide, not the jury (see Point II, *supra*), any error in instructing the jury concerning this issue is irrelevant.

The foregoing conclusions on our part make it unnecessary for us to evaluate Khawar's contention that any error in instructing the jury was invited by Globe.

VIII. THE TRIAL COURT WAS CORRECT IN ITS DETERMINATION THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE SUBMISSION OF AHMAD'S CASE TO THE JURY—INSUFFICIENT EVIDENCE TO SHOW THAT THE GLOBE ARTICLE WAS "OF AND CONCERNING" AHMAD.

The First Amendment dictates that in order to recover in a defamation action, a plaintiff must demonstrate that the alleged defamatory publication specifically refers to, or is "of and concerning," the plainiff. (*New York Times Co.* v. *Sullivan, supra*, 376 U.S. 254, 288-392 [11 L.Ed. 2d 686, 84 S.Ct. 710]; *Rosenblatt* v. *Baer* (1966) 383 U.S. 75, 83 (86 S.Ct. 669, 674). In *Blatty* v. *New York Times Co.*, (1986) 42 Cal.3d 1033, 1042 [232 Cal.Rptr. 542, 728 P.2d 1177], *cert. denied*, 485 U.S. 934, 108 S.Ct. 1107 (1988), the California Supreme Court recognized the constitutional foundation of the requirement that a defamatory publication be of and concerning a plaintiff. In discussing the dangers of defamation law without such a requirement, the court stated: "The 'of and concerning' or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt. To allow a plaintiff who is not identified, either expressly or by clear implication, to institute such an action poses an unjustifiable threat to society." (42 Cal.3d at 1044.)

In order to prevail under this standard, Ahmad must show that the Globe article either expressly mentions him or refers to him by reasonable implication. In short, the issue is whether the publication can be reasonably understood as referring to the plaintiff. (*Blatty* v. *New York*

Times Co., supra, 42 Cal.3d at 1046; *Kelly* v. *Johnson Publishing Co.* (1958) 160 Cal.App.2d 718, 721-726 [325 P.2d 659]; *Saucer* v. *Giroux* (1921) 54 Cal.App. 732, 733-734 [202 P. 887]).

Based on the fact that the article could not reasonably be understood as referring to Ahmad, the trial court was correct in granting Globe's motion for nonsuit with respect to Ahmad. The article alleges that a young man who called himself Ali Ahmand was in fact the assassin. This statement suggests that the name used by the assassin was an alias or fictitious name. Furthermore, since the true name of the assassin is not claimed to be known in the article, the only clear identification of the alleged assassin stems from the photograph. The photograph is not of Ahmad. In addition, there is no evidence to suggest that upon reading the article and seeing Khawar's picture therein, any reader could reasonably have believed that the article concerned Ahmad merely because that reader knew that Ahmad is Khawar's father.

Other facts which lend credence to the conclusion that the article is not of and concerning Ahmad center around Ahmad himself. The article states that the assassin was a young man. Ahmad was fifty-two years old in 1968 and will be eighty years old in 1996. Clearly, such a person would not be characterized as "young" as of 1968. The article alleges that the assassin is an Iranian, whereas Ahmad is Pakistani. Finally, the name used in the Globe article is Ali Ahmand, whereas plaintiff Ahmad has a different spelling of his name; while this fact is not dispositive, it is one more impediment to Ahmad establishing that the article can reasonably be understood as referring to him.

In sum, because as a matter of law the article is not of and concerning Ahmad, the trial court properly nonsuited Ahmad.

DISPOSITION

The judgment is affirmed. Khawar shall recover his costs on appeal from Globe. Globe shall recover its costs on appeal from Ahmad.

GOLD (ARNOLD H.), J*

We concur:

LILLIE, P.J.

WOODS, J.

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* Assigned by the Chairperson of the Judicial Council.

(3)

Supreme Court, U.S.
FILED
APR 16 1999
CLERK

No. 98-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GLOBE INTERNATIONAL, INC.,

Petitioner,

v.

KHALID KHAWAR,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF

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5PP

1. PERCEIVED MISSTATEMENTS PURSUANT TO RULE 15.2.

Respondent Khalid Khawar is obliged to point out a couple of misstatements in Globe International, Inc.'s petition. Globe asserts that Robert Morrow "also wrote *Betrayal*, a *New York Times* best-seller" and that Morrow was a "best-selling author". Pet. 2, 5, 6, 9. However, the record cited by Globe does not evidence this assertion (Pet. 2), and Khawar is unaware of any such evidence in the record.

In a similar vein, Globe describes Morrow as "an established authority on assassination conspiracy." Pet. 2. The record cited in support of that assertion references testimony by a witness who testified for Khawar, in which the witness acknowledged — "with some bewilderment" — that Morrow remains a figure in the President Kennedy assassination controversy who is frequently consulted as an authority in the closed world of assassination conspiracy theorists. The witness, however, also testified that his negative opinion of Morrow's credibility was shared by the majority of researchers in the assassination community. App. 32a. Insofar as the academic or journalistic communities are concerned, there was no evidence that Morrow's reputation qualified him as an established authority on public affairs. *See* App. 31a.

Globe also states that the jury found that the *Globe* article is a neutral and accurate report of the Morrow book. Pet. 3. The trial court determined, however, that the *Globe* article was not an accurate and neutral report of the statements and charges made in the Morrow book, thus disagreeing with and rejecting the jury's advisory special verdict. App. 5a. The Court of Appeal's opinion also noted that there were many

other items of evidence that supported a finding that the article was not a neutral and accurate report of the book. S. App. 5 n.1.

II. GLOBE'S ARGUMENTS.

The arguments made by Globe, a purveyor of supermarket tabloid magazines, and of the mainstream media organizations who filed *amici curiae* briefs[1], regarding the issues of actual malice, the neutral reportage theory and the involuntary public figure hypothetical, have been rejected by a unanimous California Supreme Court in a well-crafted opinion by Justice Kennard. Globe's undocumented fear of the chilling effect that the opinion has caused, or will likely cause, appears to be refuted by well publicized incidents of scandal mongering of recent vintage regarding both public and private figures who have contacts with the State of California.

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1. The *Amici Curiae* before the California Supreme Court and/or California Court of Appeal are: Los Angeles Times, The New York Times Company, The Associated Press, CBS Inc., National Broadcasting Company, Inc., American Broadcasting Companies, Inc., Newsweek, Inc., Tribune Company, The Association of American Publishers, The Society of Professional Journalists, McClatchy Newspapers, Inc., The Copley Press, Inc., Knight-Ridder Publishing, Inc., San Jose Mercury News, Inc., The California Newspaper Publishers Association, The Reporters Committee for Freedom of the Press, The Hearst Corporation, Publisher of the San Francisco Examiner, Ziff-Davis Publishing Company, Donrey Media Group, Harper's Magazine Foundation, Radio-Television News Directors Association, The California First Amendment Coalition, The American Civil Liberties Union of Northern California, The ACLU Foundation of Southern California, King World Productions, Inc., The Chronicle Publishing Company, The Daily Journal Corporation, Lesher Communications, Inc., The Recorder, and The San Francisco Bay Guardian.

Khawar does not dispute that the Circuits are in conflict regarding the existence of a neutral reportage theory concerning defamatory statements made about public figures. *See* App. 17a-18a. However, the application of the neutral reportage theory to private figures is a distinctly minority viewpoint. *See* App. 20a & n.4.

The rise of the Internet, the decentralization of media centers, and the proliferation of numerous narrow bandwidth media, do make the consequences of the neutral reportage theory of *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, *cert. den.*, 434 U.S. 1002 (2d Cir. 1977), potentially more pernicious and pervasive. The field of republication — which includes recountings and interpretations of what someone else said, saw, heard, felt or wrote — may well cover the vast majority of publications. *Cf. Time, Inc. v. Pape*, 401 U.S. 279, 285-86 (1971).

The California Supreme Court has clearly rejected such an obliteration of the common law rule on republisher's liability (*see, e.g.*, Rest. 2d Torts, § 578), as to private figures. Thus, any publisher doing business in the State of California is bound by the opinion below. As to public figures, Khawar does not quarrel with the observation of the prevailing counsel of record in *Edwards,* that the central issue of *Edwards* "was novel when decided in 1977 and remains unresolved today" and that "[w]ith *Edwards*, the Second Circuit is a step ahead of the Supreme Court — not always a safe place to be. . . ." Abrams, *The First Amendment in the Second Circuit: Reflections on Edwards v. National Audubon Society, Inc., the Past and the Future*, 65 St. John's L. Rev. 731, 737, 741 (1991).

Furthermore, Globe to date has cited only one federal or state appellate case applying the involuntary public figure theory, *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985), in the quarter century since the Court's speculation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), that:

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.

The Court has never found a person to fall within this *dictum*. *Cf.* Rosen, *Media Lament — The Rise and Fall of Involuntary Public Figures*, 54 St. John's L. Rev. 487 (1980).

Globe and its erstwhile allies have had the opportunity to voice their arguments to the California Supreme Court and Court of Appeal. They continue to do business in the State of California, presumably in accordance with the putatively onerous ruling of the California Supreme Court. That Globe cannot cite or document modification of media behavior in light of that ruling only suggests that the "chilling effect" is a fable. Khawar, moreover, argues that, if anything, the stentorian impulse to negligently and recklessly republish unverified allegations, vilification and slander under the guise of "neutral reportage" is on the increase, as the Internet, cable television, talk radio, desktop publishers and paramedia outlets crowd out the mainstream media organizations represented by the *Amici Curiae* below. There may indeed be a threat to the First Amendment, only it comes, perhaps, from those new media who would cite its letter in order to subvert its spirit.

CONCLUSION

The California Supreme Court's analysis is the proper balancing of First Amendment and personal reputation values. Affirmation of this analysis, together with overruling the neutral reportage theory of *Edwards* and retiring the "involuntary public figure" hypothetical would be in the public interest — not to mention, in this new media age of "flash and trash"[2] — in the long term interest of the press as well. The Court should therefore grant the petition to resolve these issues.

Respectfully submitted,

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2. *See, e.g.*, Shaw, "Obsessed with Flash and Trash," *L.A. Times*, Feb. 16, 1994, § A, p.1.